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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

INVESTMENT COMPANY INSTITUTE ET AL., *Petitioners,*

v.

WILLIAM B. CAMP, Comptroller of the Currency;
FIRST NATIONAL CITY BANK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners—Investment Company Institute, an association of mutual funds and their investment advisors and principal underwriters, and a number of individual Institute members—pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is reprinted as Appendix A hereto, pp. 1a to 50a, *infra*. The opinion of the District Court

for the District of Columbia is reported at 274 F. Supp. 624 (1967) and is reprinted as Appendix B hereto, pp. 51a to 94a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1969. (Appendix C, p. 94a, *infra*). A timely Petition for Rehearing was denied on August 15, 1969. (Appendix D, p. 95a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964). The basis of jurisdiction in the District Court was 28 U.S.C. § 1331 (1964).

QUESTION PRESENTED

Whether Regulation 9 of the Comptroller of the Currency, and his specific rulings thereunder authorizing national banks to sponsor and promote collective investment funds, which are functionally indistinguishable from mutual funds, (a) violate those provisions of the Glass-Steagall Act which were designed to separate commercial banking from the securities business and to prohibit commercial banks from issuing, selling, distributing, and underwriting securities, and (b) exceed the permissible scope of the bona fide fiduciary activities of national banks which the Comptroller is empowered to authorize under Section 92a, 12 U.S.C.

STATUTES AND REGULATION INVOLVED

The statutory provisions involved, 12 U.S.C. §§ 24, 377, 378, 78 (1964) (hereinafter designated as "the Glass-Steagall Act") and 12 U.S.C. § 92a (1964) are set forth in Appendix E, pp. 95a to 98a, *infra*. Also set forth in Appendix E are the pertinent parts of the

Comptroller's Regulation 9, 12 C.F.R. § 9 (1967), pp. 98a to 106a, *infra*.

STATEMENT

Petitioner Investment Company Institute (hereinafter the "Institute") is a national association representing 177 open-end management investment companies (popularly known as "mutual funds") and their 88 investment advisers and 78 principal underwriters. The mutual fund members of the Institute have assets of more than $36 billion, representing about 94 percent of the assets of all such companies in the United States; they have approximately 3.5 million shareholders.[1] In addition, Petitioners include several investment advisers and principal underwriters of individual mutual funds, all of whom are members of the Institute.[2]

Since the days of the Great Depression, the securities business in which Institute members engage has been kept completely independent and apart from the commercial banking business. In order to prevent a recurrence of the disastrous results which attended the intermingling of commercial and investment banking activities prior to the Depression, in 1933 Congress passed the Glass-Steagall Act to erect a wall of separation between commercial banking and the securities

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[1] These figures are based on the record of this case when filed in April, 1966. Current data indicates that the Institute represents 274 mutual funds, 127 investment advisers and 109 principal underwriters. The assets of the mutual fund members of the Institute total more than $50 billion and these funds have approximately 5 million shareholders.

[2] These individual Petitioners are Investors Diversified Services, Inc.; Investors Management Company, Inc.; Hugh W. Long & Company, Inc.; Wellington Management Company; and Wellington Company, Inc.

business.[3] This case involves an attempt by the Comptroller of the Currency to breach that wall, for the first time, by authorizing national banks to reenter the securities business through the promotion of commingled investment funds and the issuance and sale of securities in these funds which are functionally indistinguishable from mutual fund shares.[4]

Although commercial banks have in the past made repeated efforts to expand into the mutual fund business under the guise of exercising their traditional fiduciary powers, for more than two decades the Federal Reserve Board (hereinafter the "Board")—which until 1962 had regulatory responsibility over the fiduciary activities of national banks—consistently rejected such efforts. The Board repeatedly held that a bank's promotion of a common trust fund as a speculative investment device was not a bona fide fiduciary activity.[5]

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[3] "The Banking Act of 1933, enacted on June 16, 1933, was promulgated to *effect a complete severance of the commercial and investment banking functions* and to eradicate many of the abuses disclosed at the hearings before the Senate subcommittee." S. Rep. No. 1455 on "Stock Exchange Practices," 73rd Cong., 2d Sess. (1934), p. 185 (emphasis supplied).

[4] Former Comptroller James J. Saxon promulgated the regulations in question here. He was succeeded by Respondent William B. Camp.

[5] The Board has always made it perfectly clear that a bank's authority to operate a common trust fund for bona fide fiduciary purposes, i.e., a commingled fund made up of assets held by the bank in its traditional role as "trustee, executor, administrator, or guardian," did not extend to the operation of such funds as speculative investment devices. See, Section 584, Internal Revenue Code. The Board warned against the merchandising of such funds as speculative investments, because the use of aggressive advertising might turn a common trust fund into a mutual fund device. 42 Fed. Reserve Bull. 228 (1956). See *infra*, p. 27.

However, in 1962, Congress transferred regulatory responsibility over fiduciary activities of national banks from the Board to the Comptroller. Public Law 87-722, 76 Stat. 668 (1962), codified at 12 U.S.C. § 92a (1964). In doing so, Congress made clear that it intended no change in the existing statutory law concerning the permissible fiduciary activities of national banks.[6]

Nevertheless, promptly after receiving these responsibilities, the Comptroller promulgated regulations authorizing national banks with fiduciary powers to maintain collective investment funds as investment media and to offer shares in such funds to the public.[7] 12 C.F.R. § 9.18, amended on February 5, 1964,

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[6] S. Rep. No. 2039, 87th Cong., 2d Sess. (1962), p. 1: "No change would be made from the substantive provisions of section 11(k) other than the transfer of authority, *so that there is no alteration of existing law regarding national banks acting in fiduciary capacities.*" (Emphasis supplied.)

[7] In this same period, the Comptroller also promulgated a number of other controversial regulations permitting commercial banks to undertake additional non-banking activities. A number of these regulations have been declared unlawful. See, *Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968); *Georgia Ass'n of Independent Ins. Agents, Inc.* v. *Saxon*, 268 F.Supp. 236 (N.D. Ga. 1967), *aff'd*, 399 F.2d 1010 (5th Cir. 1968). The Comptroller neither appealed the adverse District Court decision in the former case nor filed a petition for certiorari in the latter. Several other cases challenging the Comptroller's new regulations are still in litigation. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 406 F.2d 837 (8th Cir. 1969), *cert. granted*, 37 U.S.L.W. 3493, June 23, 1969; *Arnold Tours, Inc.* v. *Camp*, 408 F.2d 1147 (1st Cir. 1969), *cert. petition filed*, June 11, 1969, Supreme Court Doc. No. 128. The latter case was consolidated for decision in the Court of Appeals with two other cases in which petitions for certiorari have been filed individually. *Wingate Corp.* v. *Industrial National Bank*, *cert. petition filed*, May 19, 1969, Supreme Court Doc. No. 129; *Wingate Corp.* v. *Camp*, *cert. petition filed*, June 11, 1969, Supreme Court Doc. No. 225.

29 Fed. Reg. 1719. Pursuant to these regulations, Respondent First National City Bank (hereinafter the "Bank") submitted and had approved a plan for the operation of a collective investment fund, the so-called "Commingled Investment Account" (hereinafter the "Account").[8]

Petitioners brought this suit against the Comptroller to have the challenged portions of the Regulation and the specific rulings thereunder declared unlawful and further action thereunder enjoined. The complaint charged that the Comptroller acted beyond his statutory power in authorizing collective investment funds in that Regulation 9:

> (a) permits bank activity which violates four specific prohibitions of the Glass-Steagall Act which prohibit commercial banks from "issuing, underwriting, selling or distributing . . . securities."; and
>
> (b) authorized banks to engage in securities activities which were clearly outside the bona fide fiduciary activities permitted national banks by Section 92a of the National Banking Act.[9]

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[8] In addition, the Account registered with the Securities and Exchange Commission as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 (1964); participations in the Account are registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1964). Other national banks may establish collective investment funds similar to the Account without obtaining specific authorization from the Comptroller. Joint Appendix (hereafter "J.A."), p. 107. The Joint Appendix filed in the Court of Appeals is included in the designated record here.

[9] Pub. L. No. 87-722, 76 Stat. 668 (1962), 12 U.S.C. § 92a (1964). The provisions of the Glass-Steagall Act to which reference is made are §§ 16, 20, 21, 32, 48 Stat. 162 *et seq.* (1933), as amended, 12 U.S.C. §§ 24, 377, 378, 78 (1964).

The District Court, in an extensive and detailed opinion, concluded that the Comptroller's regulations authorize commercial banks to enter the mutual fund business and thereby to engage in the securities activities prohibited by Sections 16, 20, 21 and 32 of the Glass-Steagall Act; that the "units of participation" in the Bank's Account are "securities" within the meaning of the relevant provisions of Glass-Steagall; that in promoting and marketing these securities, banks engage in the business of issuing, underwriting, distributing and selling securities in violation of Glass-Steagall; and finally, that Congress, not the courts, is the appropriate forum to determine whether the stringent prohibitions of Glass-Steagall should be altered.

In a per curiam opinion, the Court of Appeals reversed the decision of the District Court.[10] The Court's opinion contained no discussion of the merits, but stated that the two concurring opinions—one by Chief Judge Bazelon and the other by Judge (now Chief Justice) Burger, in which Senior Judge Miller concurred—set forth the basis of the Court's action. As we point out below, the majority concurring opinion did not deal at all with the critical issues of statutory construction.

* * * * * * *

To put this matter in perspective, it is necessary to review briefly the operation and structure of a collective investment fund of the type authorized by the Comptroller. There is no real controversy as to the

[10] The per curiam opinion stated that "while a majority of the Court has reservations about standing, these doubts have been resolved in favor in reaching the merits in cases of this consequence." *Infra*, p. 3a.

basic facts, as the Comptroller has acknowledged below.

In all significant respects, the collective investment funds authorized by the challenged regulations, and exemplified by First National City Bank's Account, are the functional equivalents of mutual funds.[11] Their purpose is identical; their structure is identical; and the legal relationship of the investor to the fund is identical.[12]

An investor becomes a participant in the Bank's Account by tendering a sum—under present regula-

[11] Chief Judge Bazelon acknowledged that, while several differences are present, "the Account is the functional equivalent of an open-end mutual fund." (*Infra*, p. 7a.) There is virtually unanimous agreement by all informed sources that the challenged regulations of the Comptroller permit the creation of an investment device virtually indistinguishable from a mutual fund. The Chairman of the Securities and Exchange Commission has said that bank-sponsored collective investment funds are "essentially the same as mutual funds." Hearings on Bank and Insurance Company Collective Investment Company Act Amendments of 1967, H.R. 14742, before the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (1968), p. 122. The Chairman of the Federal Deposit Insurance Corporation has acknowledged that the challenged regulations authorized "bank entry in the mutual fund business." Hearings on S. 2704 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966), p. 276 (hereinafter referred to as the "1966 Hearings.") Members of Congress and the press have all made clear that what is at stake is bank entry in the mutual fund business. See, *e.g.*, S. Rep. No. 1351 on S. 3724, 90th Cong., 2d Sess. (1968), pp. 10, 11, 22; New York Times, April 30, 1967, sec. 3, p. 1.

[12] For a general description of the structure and operation of open-end management investment companies, or "mutual funds" as they are commonly known, see Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth submitted to the House Committee on Interstate and Foreign Commerce, H. Rep. No. 2337, 89th Cong., 2d Sess. (1966).

tions, $10,000 or more—to the Bank pursuant to a short, standardized form which accompanies a sales flyer, apparently sent out broadside to all bank customers, announcing the creation of the Account. The promotional literature is accompanied by a copy of the prospectus for the fund. (J.A. 192) In that sales instrument the Bank describes the "opportunity for long-term growth of principal and of income" by investing in the Bank's fund. It advises the prospective investor that, "You should give careful consideration to these factors in deciding whether the Commingled Account provides a suitable investment medium for you." If the prospective investor has any questions, he is invited to telephone the Bank. (J.A. 192)

Further, the potential investor is told that he can invest in the Account merely "by completing the tear-out authorization form on page 13 of the Prospectus and forward[ing] it with his check" to the Bank. (J.A. 192) Upon receipt, the investment is automatically deposited in the Bank's Account and is available, as part of a pool of assets, for the purchase of portfolio securities in furtherance of the Account's investment policy.

Following the standard practice of mutual funds, at the time the investor tenders his money to the bank officer for investment in the Account, a security—denominated a "unit of participation"—is issued to the investor which represents the investor's share in the assets of the Account.[13] As is true of shares in a mutual fund, the "unit of participation" permits the

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[13] Many mutual funds are non-corporate in form and issue securities denominated by a variety of names such as "beneficial interests" and "participatory agreements" (J.A. 236).

investor and the Bank to determine conveniently the investor's proportionate interest in the Account. An investor may redeem his "units of participation" in the Account for cash as he wishes, a feature which is, of course, the hallmark of an open-end mutual fund.

The management structure of the Bank's Account parallels that of a mutual fund. The operation of the Account is supervised by a Committee of five persons, who occupy "a position equivalent to that occupied by the board of directors of a mutual fund." *Infra,* p. 59a. The Bank provides the Account with investment management services, in return for a stated management fee pursuant to an investment advisory contract entered into annually by the Committee and the Bank. The management fee increases as the size of Account increases; the Bank's fee is one half of one percent of the total net asset value of the Account. *Ibid.*

The Bank acts as underwriter of the units of participation pursuant to a contract executed between the Account and the Bank. *Ibid.* Under that contract, the Account agrees that participations will at all times be available for purchase upon the request of appropriate personnel of the Bank. Sales of units of participation are handled exclusively by employees and officers of the Bank and are made without commission or sales load. Mutual funds similarly execute underwriting contracts with distributors, who sell the shares to the public, generally with a sales commission (or load), but in many cases for no commission, (*i.e.,* in the case of so-called "no-load funds"). *Infra,* p. 55a.

The Bank's reports to participants in the Account highlight the speculative nature of the Bank's investment efforts and its aggressive attempts to market its

fund. The six-month report to participants in April, 1967 noted that, "Investing in common stocks and convertible securities for long-term growth of both capital and income is our stated investment policy." In carrying out that policy, the report noted that, "We have invested your funds in ten major industries with emphasis in the office equipment, electrical and electronics, drug and cosmetic, and airline groups." (J.A. 202) Moreover, the Bank compares the performance of its Account with the Dow-Jones Industrial Average, a method of dramatizing investment results frequently used by mutual funds. Thus, the Bank noted that in one period, while the Dow-Jones had increased only 6.5 percent, the Account increased 24.3 percent. (J.A. 202)

These facts demonstrate beyond doubt that First National City Bank is operating and promoting its Account in the same way as any other mutual fund.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED ARE OF MAJOR PUBLIC IMPORTANCE

There is virtually unanimous agreement as to the importance of the questions presented by this case. This was explicitly recognized by the Court of Appeals in its per curiam opinion which noted that, although a majority of the Court had reservations about Petitioners' standing to sue, their "doubts have been resolved in favor of reaching the merits in [a case] of this consequence." (*Infra,* p. 37a.) And, in his separate opinion, Judge (now Chief Justice) Burger explained he had concluded that Petitioners had standing "in order to make a majority holding for review of the merits of a subject of such importance." Judge Burger expressed the hope that "consideration of the

merits . . . at our level may be useful to further judicial review." [14] (*Infra*, p. 31a.)

FIRST, the decision below opens the first breach in the Glass-Steagall wall of separation which Congress erected in 1933 between commercial banking and the securities business. It reverses a consistent course of judicial and administrative interpretation of the Glass-Steagall Act over the last 35 years. On the only prior occasion when the Glass-Steagall Act has been considered here, this Court interpreted the Act in such a way as to resolve all doubts against potential intermingling of commercial banking and the securities business, characterizing the Act a "preventive or prophylactic measure." *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). Indeed, to prove a violation of the Act, the Court held that there was no need to demonstrate that commercial banks were, in fact, guilty of conflicts of interest or other improper dealings in their securities activities.[15] The Court found that the critical

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[14] The controversial nature of the challenged regulations and the importance of the present case have also been recognized and commented upon in the banking industry and in learned journals. See, *e.g.*, Henderson, Widening of Commercial Banks' Functions Advocated by Saxon in Two Distinct Areas, The American Banker, Feb. 5, 1963; Marin, Common Trust Funds—Development and Federal Regulation, 83 Bank. L. J. 565 (1966); Comment, Banks, Trusts and Investment Companies: The Commingled Investment Fund, 115 U. Pa. L. Rev. 1276 (1967); Comment, Regulation of Bank-Operated Collective Investment Funds—Judicial or Legislative Resolution of an Administrative Controversy, 73 Yale L. J. 1249 (1964).

[15] As Senator Bulkley, a major spokesman for the Act, explained prior to its passage:

> "It is not, of course, contended that the abuses here intimated are never avoided by the good conscience of the bankers. On the contrary, I believe they are avoided generally by good bankers. Certainly they are avoided much more often than

element was the *threat* of conflict of interest or improper dealing which was raised simply by engaging in the proscribed activities.[16]

The Federal Reserve Board likewise has interpreted the provision of the Act which it administers (Section 32) for almost thirty years so as to insulate a broad variety of securities activities, including the operations of mutual funds, from commercial banking.[17] Upon

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they occur. Yet the danger is always there, and must be there as long as human nature remains human nature. . . . [W]e must surround the banking business with sound rules which recognize the imperfection of human nature [so] that our bankers may not be led into temptation, the evil effect of which is sometimes so subtle as not to be easily recognized by the most honorable man." 75 Cong. Rec. 9912 (May 10, 1932).

[16] A stringent interpretation of the prohibitions of the Glass-Steagall Act has been applied in rejecting other contentions of the Comptroller for a relaxed reading of the Act. *Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S. App. D.C. 173, 392 F.2d 497 (1968).

[17] The Board has applied the prohibitions of Section 32 of the Glass-Steagall Act to bar interlocks between commercial banks and a variety of organizations which were engaged in the issuance, sale, distribution or underwriting of securities, such as:

(i) open-end investment companies (or mutual funds) 12 C.F.R. § 218.101 (1951);

(ii) corporations engaged in selling or underwriting mutual funds shares, 12 C.F.R. § 218.107(e) (1963);

(iii) investment advisers which control sales distribution subsidiaries, 12 C.F.R. § 218.107 (1963);

(iv) real estate investment companies frequently issuing a substantial amount of stock relating to their capital, 12 C.F.R. § 218.104(b) (1961);

(v) corporations in special circumstances in the process of organization and selling their own stock, 12 C.F.R. § 218.105 (1961); and

(vi) closed-end investment companies in process of organization, 12 C.F.R. §§ 218.102 (1960), 218.104 (1961).

repeated occasions, the Board has specifically barred interlocking directorates between commercial banks and mutual funds on Glass-Steagall grounds.[18]

SECOND, this is no mere technical issue, but one of great economic significance. The opinion below opens the way for full scale entry by commercial banks into the mutual fund business. It points to the "other bank-sponsored funds likely to follow [which] will compete with mutual funds and with those who market their shares." (*Infra*, p. 2a.) The Comptroller has predicted that, in the next decade, commercial banks operating under the challenged regulations "might capture as much as $2 billion of mutual fund business."[19] In this connection, Chief Judge Bazelon has noted:

> "The major consequences of expanded investment service by banks will be a quantitative change in

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[18] The Federal Reserve Board has consistently ruled that Section 32 prohibits interlocking directorates between member banks and mutual funds. In 1951, for example, the Board held:

> ". . . it is the opinion of the Board that if such [an open-end investment] company is issuing or offering its redeemable stock for sale, it is 'primarily engaged in the issue . . . public sale, or distribution, . . . of securities' and that section 32 of the Banking Act of 1933 as amended, prohibits an officer, director or employee of any such company from serving at the same time as an officer, director or employee of any member bank." 12 C.F.R. § 218.101 (1951).

In 1941, the Board made a definitive ruling on this point, 27 *Fed. Reserve Bull.* 399 (1941), and has stringently adhered to this position. See, *e.g.*, 12 C.F.R. § 218.107 (1963). In the Board's December 15, 1965 Memorandum it stated:

> "Ordinary open-end investment companies or mutual funds have been regarded by the Board as subject to Section 32. Accordingly, the Board consistently has taken the view that interlocking relationships described in the statute between such funds and member banks are prohibited. . . ." 1966 Hearings, p. 585.

[19] *Infra*, p. 49a n.10.

> the volume of securities bought, sold, and held by banks. While substantial transactions in securities by banks may be essential for the modern management of their customers' money, an increase in their already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in economy at large." (*Infra,* p. 16a.)

THIRD, the decision of the Court of Appeals casts serious doubt whether the Glass-Steagall Act will remain an effective and viable bar to commercial banks' engaging in traditional mutual fund activity and other securities activities. Because of the functional identity of "units of participation" with shares in traditional mutual funds, the decision raises the question whether such mutual fund shares are "securities" under the terms of the Glass-Steagall Act. Further, because of the distorted construction below limiting the prohibition against "underwriting" to those underwritings which involve a distribution profit, there is serious doubt whether distributing and selling "no load" mutual funds fall within the strictures of the Act. (See *infra,* pp. 24-25.) Also, the Federal Reserve Board's well-established rulings that mutual funds are engaged in "issuing" their own shares within the meaning of the Act (see *infra,* p. 23) have been virtually obliterated by the decision below. Finally, the Court of Appeals' willingness to include speculative securities activity by banks as permissible "fiduciary activities," even though admittedly "new and free wheeling,"[20] casts serious doubt on what, if any, limitations remain upon commercial bank expansion.

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[20] *Infra,* p. 9a.

These important, unanswered questions relating to the Glass-Steagall Act and to Section 92(a) are all the more uncertain because there is no opinion of the court below dealing with these issues. The brief per curiam order casts no light on these questions; the majority concurring opinion disregarded all the questions of statutory construction and improperly treated this matter, in three short paragraphs, as a case involving review of the discretionary action of a federal agency; and only one judge on the Court of Appeals panel even attempted to deal with these difficult issues. It seems self-evident that any relaxation of the express prohibitions of this seminal legislation deserves a full-scale, definitive analysis and exposition. For these reasons alone, this Court should grant certiorari.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision below, permitting banks to reenter the securities business, distorts the clear prohibitions of the Glass-Steagall Act and vitiates the intent of Congress. This result is without support in judicial precedents or the text or history of the statute. Moreover, the conclusion of the Court of Appeals, if permitted to stand, will blur the sharp and comprehensive restrictions on commercial bank activity contained in the Glass-Steagall Act and Section 92a of the National Banking Act and thus could lay the way open for a return to the banking abuses which characterized the economy in the period immediately preceding the financial panic and the Great Depression.

As we have noted above, despite the significance of the issues involved here and the broad implications of its decision, there is, surprisingly, no definitive opinion of the Court of Appeals dealing with the merits of

the case.[21] The concurring opinion of the two-judge majority consisted basically of an abstract discussion of the question of Petitioners' standing to sue, which issue ultimately was resolved in Petitioners' favor. In its abbreviated reference to the merits, the majority did not deal at all with the statutory construction issues relating to the Glass-Steagall prohibitions. Rather, it approached the case as one involving a challenge to the discretionary action of a federal agency and resolved the entire matter with the terse observation that several government agencies had given "careful and comprehensive study to all aspects of [the] problem"; that these agencies "with their accumulated expert experience have decided [the] issues" in question; and, that their decisions "are entitled to substantial deference and on this record I see no reason for disturbing their conclusions." (*Infra*, p. 50a.)[22]

Of course, as the decisions of this Court have made clear, the standard of review adopted by the majority

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[21] There was no discussion of the merits at all in the brief per curiam order.

[22] The majority concurring opinion stated that the court's power to review was

> "narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investment funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose." (*Infra*, pp. 49a to 50a.)

Petitioners' complaint, of course, did not raise these policy questions or debate the wisdom of commercial bank entry into the mutual fund business. The repeal of the Glass-Steagall prohibitions, if presently justified on such "policy" grounds, is a matter for Congress. See 115 Cong. Rec. H10554, H10559 (Daily ed. November 5, 1969); 114 Cong. Rec. 59497 (Daily ed. July 26, 1968).

concurring opinion is inappropriate in cases charging that administrative action is in excess of statutory authority.[23] Moreover, the fact is, except for the unpublished conclusions of the Comptroller's office, the various regulatory agencies referred to have not resolved Glass-Steagall issues presented in this case. On the contrary, these agencies raised, but expressly declined to rule on, critical Glass-Steagall questions.[24]

Although the minority concurring opinion below addressed itself to the merits of the Glass-Steagall issue, that opinion glossed over the difficult question

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[23] "Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946) (footnote omitted).

See, also *NLRB* v. *Brown Food Stores*, 380 U.S. 278, 292 (1965); *NLRB* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 499-500 (1960); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-78 (1954); See, also, *Elgin, Joliet & Eastern Ry.* v. *Benj. Harris & Co.*, 245 F. Supp. 467, 472 (N.D. Ill. 1965).

[24] The Federal Reserve Board stated that it "expressed no position with respect to whether [Section 21 of the Glass-Steagall Act] might be held applicable to the establishment or operation of the proposed 'commingled investment account.'" 12 C.F.R. § 218.111 (1965). The Securities and Exchange Commission considered the Account solely from the point of view of the securities laws subject to its jurisdiction; it had no authority to deal with, and made clear it entertained no view upon, the legality under the Glass-Steagall Act of commercial bank entry into the mutual fund business. (See, *e.g.*, Hearings on Amendment No. 438 to S. 1659 before the Senate Banking and Currency Committee 90th Cong., 1st Sess. (1967) p. 1296.) And, the Department of Justice advised the Subcommittee on Banking and Currency and the Securities and Exchange Commission that "it is not clear . . . whether the implementation of the bank's proposal would be a criminal violation" of Section 21 of the Glass-Steagall Act. (1966 Hearings p. 588.) The view of none of the agencies can be considered regulatory approval of the Bank's activities under the Glass-Steagall Act.

of statutory interpretation and misread the extent of Congress' concern in enacting Glass-Steagall.

The Glass-Steagall Act Prohibits Entry by Commercial Banks Into the Mutual Fund Business.

To separate commercial banking from the securities business, Congress enacted four interrelated prohibitions in the Glass-Steagall Act. The keystone provision is Section 21. That Section prohibits a company from engaging simultaneously in two specified lines of business—the first is "issuing, underwriting, selling or distributing . . . securities"; the second is "receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor . . . ," *i.e.*, the business of commercial banking. This Section applies across the board to all types of commercial banks—national and state-chartered; member and non-members of the Federal Reserve System. Section 21 forces a choice: an enterprise can engage in commercial banking or it can engage in issuing, underwriting, selling and distributing securities. Under Section 21, it cannot do both.[25]

The basic prohibitions of Section 21 were supplemented with a number of other protective provisions. In enumerating the corporate powers of national banks in Section 16, Congress included a proviso intended to

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[25] One court has characterized Section 21 as prescribing "complete separation" of commercial banking from any dealing in securities:

> "When Congress meant complete separation, it said so, in this [Section of the] Act, in unmistakable terms. It knew what terms to use, and used them." *Agnew* v. *Board of Governors*, 80 U.S. App. D.C. 377, 385, 153 F.2d 785, 793 (1945), *rev'd on other grounds*, 329 U.S. 441 (1947).

preclude any construction of these powers which would permit national banks to underwrite or deal in securities.[26] 12 U.S.C. § 24. Moreover, Congress made certain that banks did not accomplish indirectly what they were forbidden to do directly. Section 32 prohibits directors, officers or employees of national or state member banks of the Federal Reserve System from holding similar positions in enterprises primarily engaged in the issue, flotation, underwriting, public sale or distribution of stocks, bonds, or similar securities. Section 20 is a parallel provision designed to prohibit interlocks or affiliations between member banks, on the one hand, and companies engaged principally in the securities business on the other. These provisions unequivocally prohibit the establishment of a bank-sponsored mutual fund in the guise of a commingled investment fund.

A. "Units of Participation" are "Securities" within the meaning of the Glass-Steagall Act.

The basic issue of statutory interpretation is whether "units of participation" are "securities" within the meaning of the Glass-Steagall Act. The Government has based its defense of the Comptroller's regulations essentially upon the proposition that such units are not "securities." That position is clearly wrong, as found by the District Court, the only court to rule squarely on this issue.[27]

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[26] *Cf.* Section 5(c), 12 U.S.C. § 335, similarly limiting the powers of state member banks of the Federal Reserve System.

[27] The majority concurring opinion did not deal with this issue. The minority concurring opinion appears to proceed on the assumption that the "units of participation" are not "securities," although it does not, in terms, so hold. (See, *infra*, p. 50a.)

The Act refers to "securities" in a context which makes clear that the term should not be narrowly construed. The language itself—in Sections 20 and 21 "stocks, bonds, debentures, notes or other securities"—commands a broad reading that will not frustrate the policies of the Act.[28]

Bank regulatory officials themselves have made clear that "units of participation" in the Account are "securities" *within the meaning of the Glass-Steagall Act*, just as they have "consistently taken the position that participations or shares in . . . [a] mutual fund are 'securities' for the purpose of Section 32" of the Glass-Steagall Act. 1966 Hearings, p. 583. The Federal Reserve Board held specifically in connection with commingled investment accounts, that

> "Participation or interests in accounts [should] be regarded as 'securities' under Section 32 [of the Glass-Steagall Act]." (*Id.*, p. 584.)

In reaching such a result, neither the District Court nor the Federal Reserve Board construed the term "securities" in the Glass-Steagall Act in an overly-broad way which would cover new or unique types of corporate instruments. Quite simply, the "units of participation" are "securities" because they represent a pro rata interest in an investment media—the

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[28] Thus, the Glass-Steagall Act, in an authoritative opinion of the Federal Reserve Board, has been held to be

> ". . . sufficiently broad to comprehend securities which, while neither stocks or bonds, have attributes which cause them to be 'similar' to or somewhat like, either bonds or stocks." 1966 Hearings, p. 584.

Account—and possess all the indicia of such commonplace securities as shares in a mutual fund.[29]

B. In operating commingled investment funds, banks are engaged in the business of issuing, selling, distributing, underwriting and dealing in securities.

The second critical issue of statutory interpretation is whether a bank-sponsored commingled investment fund will be engaged in any of the activities proscribed by the Act—"issuing, selling, distributing or underwriting" the securities of the fund.[30]

The Bank's Account, like any "open-end" mutual fund, will be substantially engaged in "issuing" its

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[29] Petitioners do not contend that the meaning of "securities" in the Glass-Steagall Act is necessarily the same as its meaning in the Securities Act of 1933. Nevertheless, it is relevant to note that both reform statutes were passed after the same extended series of hearings before the Senate Banking and Currency Committee, in which the finding was made that the activities of national banks were closely connected to the failure of the securities market. It is difficult to believe that the same term— "securities"—would have a radically different meaning in the two Acts without any indication whatever in the legislative history of either statute that such a difference was intended.

[30] The only specific prohibition of Glass-Steagall which the minority concurring opinion discussed was whether a bank sponsoring a commingled investment fund would be engaged in "underwriting." The opinion did not discuss at all whether the bank's activities would constitute "issuing", "selling", or "distributing" within the meaning of the Act. Chief Judge Bazelon apparently avoided dealing with the explicit prohibitions of Section 21 because he considered that section merely an appendage of Section 16 of the Glass-Steagall Act and concluded that the specific prohibitions of Section 21 added little to the provisions of Section 16. There is no justification or legislative support—and none is cited—for so diluting the express prohibitions of Section 21, which extend far more broadly than Section 16. The latter section primarily confers corporate powers on national banks; it deals only peripherally with the *prohibitions* of the Glass-Steagall amendments.

own securities, as that term is used in Glass-Steagall. Units of participation in the Account are continuously available at the Bank and are "issued" to persons investing in the Account.[31] The Account's redemption provisions provide a constant motivation for the Bank to continue to issue and sell participations in the Account to prevent a reduction in its size.[32]

The Federal Reserve Board has repeatedly ruled that such regular and systematic issuance of its shares by a mutual fund—precisely the same activity as that engaged in by the Account—constitutes "issuing" securities within the meaning of the Glass-Steagall Act. Indeed, the Board has ruled that such activity constitutes a *primary* engagement of a mutual fund. The Board explained that:

> ". . . it is apparent that the more or less continued process of redemption of the stock issued by [a mutual fund] would restrict and contract [the fund's] activities if it did not continue to issue its stock. Thus, the issuance and sale of its stock is essential to the maintenance of the [fund's] size and to the continuance of operations without substantial contraction, and therefore the issue and sale of its stock constitutes one of the primary activities of such a [fund]." 12 C.F.R. § 218.101 (1951).

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[31] By the end of its first fiscal year, August 31, 1967, the Account had issued more than 879,000 units of participation. See SEC File 811-1385, Prospectus for Commingled Investment Account of First National City Bank, dated September 22, 1967, p. 3; SEC File 811-1385, Form N-IR, Annual Report of Management Investment Company of the Commingled Investment Account of First National City Bank for Fiscal Year Ended August 31, 1967.

[32] During its first full fiscal year, more than 10,000 units of participation in the Account were redeemed. *Ibid.*

Section 21, of course, prohibits a bank absolutely from engaging in the business of issuing securities—whether or not that activity is a primary function of the bank.

Apart from issuing securities in operating its Account, the Bank is also engaged in the business of selling, distributing, underwriting, and dealing in securities, each of which is independently proscribed by the Glass-Steagall Act. The Account itself has stated that its "units of participation will be lawfully offered by [the Account] through the offices of First National City Bank in New York." (J.A. 140) First National City Bank, through its offices and mailings, has broadly solicited potential customers to invest in the Account by means of a "tear-out authorization form." Units of participation are forwarded by Bank officers in exchange for investors' money. These activities constitute "selling" and "distributing" the participations issued by the Account under any definition of those terms.

Likewise, there can be no doubt that the Bank is engaged in "underwriting" the units of participation even though it receives no direct compensation for its services. In taking the securities issued by the Account and selling them through Bank personnel, the Bank fulfills the traditional underwriter's role.

Without the citation of any persuasive authorities, the minority concurring opinion concluded that the Bank was not engaged in "underwriting" (and presumably also not engaged in "selling", "distributing", and "dealing in" securities) because the Bank did not obtain any direct distribution profit or sales commissions from its underwriting activities, even though

the Bank admittedly will receive a substantial management fee which will increase as more participations in the Account are sold. However, it is clear that earning a distribution profit is not a necessary indicia of underwriting or distribution under the Act. In a definitive interpretation, the Federal Reserve Board has held that a mutual fund continuously issuing its shares—as the Bank's Account will—is engaged in the "public sale" and "distribution" of its securities within the meaning of Glass-Steagall, irrespective of the fact that "the investment company does not derive any direct profit from the sales" of these shares.[33]

To read into the definition of "underwriting" and related terms in the Glass-Steagall Act the requirement that the underwriting function must produce a distribution profit would lead to the astonishing result that banks would be free to sponsor, promote, and sell the shares of traditional mutual funds of the no-load variety.[34]

Given this understanding of the role of banks in promoting collective investment funds as generally-available investment devices in clear violation of the prohibitions of Glass-Steagall, it is clear that such unlawful sales and promotional efforts cannot be justified as the exercise of traditional fiduciary activity

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[33] 12 C.F.R. § 218.101 (1951).

[34] The establishment of the Account also conflicts with Section 16 which restricts national banks to the purchase and sale of securities "for the account of customers." That provision insured that nothing in the Act was construed as denying banks the right to order the purchase or sale of securities on specific instructions from, and for the account of, their customers.

under the banking laws.[35] Established fiduciary relationships have always arisen "from individually negotiated trust agreements, individually negotiated managing agency accounts, or similar arrangements . . . ."[36] However, the operation of the Account, an investment device open to the public at large, represents a sharp departure from such regular and accepted banking practices. The Bank's Account is a "package deal offered to all comers" (*infra,* p. 10a); there is no attention to the financial and personal needs of the individual investor, a fact which characterizes the proffer of true fiduciary services. The only standard to determine whether the Bank's Account is suitable in a given case is a showing that the potential investor has the required $10,000 to invest.[37] This is a rela-

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[35] Section 92a of the National Banking Act authorizes the Comptroller to grant a national bank power to act as a trustee and in other conventional fiduciary roles:

> "When not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver Committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

[36] Statement of Chairman Manuel F. Cohen of the Securities and Exchange Commission, 1966 Hearings, p. 136.

[37] In the words of Chief Judge Bazelon:

> "The bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to 'valued customers,' however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000. . . ." (*Infra,* p. 13a n.9.)

tionship of the commercial market place, not that of the fiduciary and his cestui que trust.

Respondents contend that the establishment of a bank-sponsored mutual fund is merely an imperceptible extension of true fiduciary services previously offered by national banks in the form of common trust funds where a bank holds money in the capacity of strict trustee. However, the Federal Reserve Board has been careful to limit the use of common trust funds to bona fide fiduciary purposes[38] and repeatedly warned banks against aggressive use of advertising which might turn a common trust fund into a mutual fund device.[39]

C. A strict interpretation of the prohibitions of Glass-Steagall is consistent with Congress' intent in separating commercial banking from the securities business.

The legislative record lends support to a stringent reading of the relevant prohibitions of Glass-Steagall to bar banks from promoting and operating bank-sponsored mutual funds.

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[38] In this connection, the Board stated:

"[In permitting] the operation of Common Trust Funds, the Board intended that a Common Trust Fund should be used merely to aid in the administration of trusts by a trust institution through the commingled investment of funds of various trusts . . . it was contemplated that [the] trust guise or form should not be used to enable a trust institution to operate a Common Trust Fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." 26 Fed. Reserve Bull. 393 (1940).

[39] 42 Fed. Reserve Bull. 228 (1956).

A major concern of Congress in passing Glass-Steagall was to deal with the inherent conflicts of interest faced by a bank advising a customer to invest in securities in which the bank has a financial interest. In its investigations prior to the passage of Glass-Steagall, Congress focused upon the need for banks to give "disinterested investment counsel" and the inexorable conflict of interest which arose where bankers, consulted in their role of financial adviser, actually had "something to sell" to their customers which would result in a profit to the bank.[40]

The prospect of "profit" for a bank operating a collective investment fund and the risk of undue influence upon the investment advice a bank gives its customers is clear.[41] The bank's management fee is directly related to the size of the fund—the more participations sold, the greater the bank's fee. There is also a continuing pressure on the Bank and its officers to market participations because of the redemption feature of the commingled fund. This situation, where the bank clearly stands to gain if it steers potential investors to its own mutual fund, illustrates one of the most wide-

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[40] In this regard, the Report of the Senate Committee on Banking and Currency stated:

> "Commercial banks found a fertile field among its [sic] depositors for purchasers of security issues which their investment affiliates were sponsoring. These banks, violating their fiduciary duty to depositors seeking disinterested investment counsel from their bankers, referred their depositors to the affiliates for advice." S. Rep. No. 1455, 73rd Cong., 2nd Sess. (1934) p. 163. *Cf.* 75 Cong. Rec. 9912 (1932).

[41] The minority concurring opinion below conceded that because "the Bank's compensation is tied to the size of the fund, there will be pressure to market the participations to maintain and increase its assets." *Infra*, p. 13a.

spread abuses which Congress identified and intended to reach in the Glass-Steagall Act.[42]

There were a number of other potential conflicts which Congress found to exist when commercial banks engaged in the securities business, each of which is present in the Comptroller's proposal that banks operate mutual funds.[43] Then, banks had become identified with their securities affiliates and had a substantial interest in assuring their success, an interest which might well have affected the independence of the bank's judgment. Today, a bank would have a similar interest in the performance of its collective investment fund

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[42] The Congressional purpose of assuring disinterested investment advice, expressed in the applicable sections of Glass-Steagall, is reflected in the exemptive provision which was added to Section 32 by the Banking Act of 1935, 49 Stat. 709 (1935), 12 U.S.C. § 78. That provision permits the Federal Reserve Board to make exceptions to the prohibitions on interlocking relationships in Section 32 by general regulation, but only on a showing that such exceptions will "*not unduly influence . . . the advice [the bank] gives its customers regarding investments.*" (Emphasis added.) The Federal Reserve Board has also commented upon this problem of impartial investment advice as a principal danger that Congress "regarded as justifying the separation of commercial banks from the underwriting field":

> ". . . that the quasi-fiduciary responsibilities of banks in giving investment advice to customers (including 'correspondent' banks) would not be discharged with optimum effectiveness if the advisor bank was subject to a conflict between its own interests (or those of its personnel) as investment banker and the interests of its customers as investors." Memorandum of the Board of Governors of the Federal Reserve System as Amicus Curiae, pp. 5-6, *Baker, Watts & Co.* v. *Saxon*, *supra*, Civ. Act. No. 97-66 (D.D.C.).

[43] See *Relation of Banks with the Securities Market*, Hearings Pursuant to S. Res. 71, before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3rd Sess. (Appendix) (1931), pp. 1063-64.

and its portfolio of securities, thus possibly influencing the bank, in its creditor role, to support a lagging portfolio company.[44]

Finally, it should be noted that Congress' concern was not directed exclusively, as the minority concurring opinion below asserted, to investment practices which risked a bank's own assets.[45] A principal focus of the Senate investigation of the banking and securities industries was the practice of establishing investment "affiliates" of national banks—including investment trusts like those involved here—which bought and sold securities purely for investment or speculative

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[44] Furthermore, Congress was aware that a bank's goodwill and reputation might suffer, with damaging consequences to the economy at large, if the securities owned by the bank's affiliate lost their value. *Id.* at 1064. The Federal Reserve Board has recently echoed this Congressional concern. 12 C.F.R. § 218.104(c) (1961).

A related risk with which Congress was concerned arises from the fact that large city banks, which will presumably be operating collective investment funds, act as correspondents to large numbers of banks in smaller communities throughout the country. There is a clear risk that large banks operating collective investment funds would use these correspondent relationships to influence smaller banks to steer their customers to the bank mutual fund. Protection of the integrity of such correspondent relationships and avoiding the risk of their contamination were of prime concern to Congress in adopting the Glass-Steagall Act. 75 Cong. Rec. 9910 (May 10, 1932).

[45] Significantly, the activities of many of the most prominent and notorious of investment affiliates, including those of Respondent Bank, *in no way risked the assets or capital of the affiliated bank*. S. Rep. No. 1455, 73rd Cong., 2nd Sess. (1934) pp. 156-159; 75 Cong. Rec. 9909-9910 (May 10, 1932). Indeed, Congress was fully aware that a major reason why banks organized affiliated investment companies was to protect the assets of the affiliated bank and the monies of its depositors. Obviously, Congress did not restrict its concern only to investment activities of affiliates that risked the assets of the parent bank. *Id.* at 9911.

purposes and whose activities did not affect the assets of the bank.[46]

CONCLUSION

For the foregoing reasons, Petitioners pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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November 12, 1969

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[46] The prohibitions of Glass-Steagall were understood at the time of the passage of the Act to bar relationships between a bank and a collective investment fund of the type authorized by the Comptroller's regulations. The record herein describes one such situation where a commercial bank was actively engaged prior to the passage of the Glass-Steagall Act in selling and offering shares in a collective fund whose operations were virtually identical to those of a present day mutual fund. The fund and its investment adviser were terminated in 1934 "[i]n consequence of certain provisions of the Banking Act of 1933 [the Glass-Steagall Act] and recent rulings of the Federal Reserve Board made pursuant thereto . . . ." (J.A. 51)

See "Relations of Banks with the Securities Market," Hearings Pursuant to S. Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong., 3rd Sess., (Appendix) (1931) p. 1057.

APPENDIX

APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,164

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.,
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

FIRST NATIONAL CITY BANK,
Intervenor

Petition to Review Orders of the
Securities and Exchange Commission

No. 21,661

FIRST NATIONAL CITY BANK,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

No. 21,662

COMPTROLLER OF THE CURRENCY, WILLIAM B. CAMP,
Appellant

v.

INVESTMENT COMPANY INSTITUTE, et al.,
Appellees

Appeals from the United States District Court
for the District of Columbia

Decided July 1, 1969

Before: BAZELON, *Chief Judge*, WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER, *Circuit Judge*.

PER CURIAM:* In these appeals the mutual fund industry levels a two-pronged attack on a national bank's authority to operate a collective investment fund as a service of its trust department. The fund is a commingled managing agency account, similar in most respects to an open-end mutual fund. First National City Bank's Commingled Investment Account (the Account) and other bank-sponsored funds likely to follow will compete with mutual funds and with those who market their shares. Competitors claiming that the Account is unlawful are the Investment Company Institute (ICI), an association of mutual funds and their investment advisers and underwriters; and the National Association of Securities Dealers (NASD), whose members sell shares in open and closed-end mutual funds.

The Account was registered with the Securities and Exchange Commission as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, and approved by the Comptroller of the Currency as a bona fide fiduciary activity authorized for national banks by § 92a of the Federal Reserve Act of 1913, 12 U.S.C. § 92a. The NASD intervened before the Securities and Exchange Commission to oppose the grant to the Account of exemptions from certain provisions of the Investment Company Act, and now seeks to set aside the Commission's orders granting them.[1] The ICI sued the Comptroller of the Currency

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* These opinions were prepared prior to June 21, 1969 and are issued pursuant to the Judgment of this court entered on that date. [Footnote by the Court.]

[1] The petition for review of the Commission's order was previously dismissed by this court on the ground that the NASD lacked standing as a party aggrieved under § 80a-42(a) of the Investment Company Act. *National Association of Securities Dealers* v. *Securities & Exchange Comm'n*, No. 20164 (decided Nov. 21, 1967). A petition for rehearing en banc was granted, and the division opinion

and First National City Bank (the Bank) in the United States District Court for the District of Columbia for a declaratory judgment invalidating so much of the Comptroller's Regulation 9, 12 C.F.R. § 9.18, as permits national banks to operate this type of account. Upon cross-motions for summary judgment, the District Court invalidated portions of the regulation and required the Comptroller to rescind approval of the Account. *Investment Company Institute* v. *Camp,* 274 F. Supp. 624 (1967). From that judgment, the Comptroller and the Bank appeal.

Each appeal raises difficult questions of competitors' standing. While a majority of the court has reservations about standing, these doubts have been resolved in favor of reaching the merits in cases of this consequence. On the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions. Accordingly, we affirm the orders of the Securities and Exchange Commission and reverse on the merits the judgment of the District Court in favor of the Investment Company Institute. It is so ordered.

The opinion of Judge Burger, in which Judge Miller concurs, and the opinion of Chief Judge Bazelon, which follow, set forth the reasons for our action:

BAZELON, *Chief Judge,* concurring: First National City Bank's plan to operate a collective investment fund has generated complex and controversial issues for resolution by the Comptroller of the Currency and the Securities and Exchange Commission. Because this innovation in banking will create massive competition for the mutual fund industry, its members have brought the dispute to court. For the reasons stated at the conclusion of this opinion, I

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vacated on January 1, 1968. The en banc order was subsequently vacated on April 12, 1968, to permit the assigned division to reconsider the matter. The case was consolidated for decision with Nos. 21661-62, and considered without reargument.

believe that representatives of the mutual fund industry have standing to adjudicate the important legal questions aired at length before the administrative agencies.

On the merits, the cases together present an interplay of administrative decisions designed to serve different but complementary regulatory aims. The Bank's plan straddles two sets of statutes. The result of a complicated, if sometimes awkard, accommodation of the requirements of each. Petitioners below claim that this accommodation compromises the vital protection to investors and bank customers afforded by the securities and banking laws, and creates a dangerous blend of securities dealing and commercial banking. From an analysis of the relevant statutes and their legislative history, I conclude that the Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Commission, was established in accordance with law.

I

Introduction

Since 1962, the Comptroller has exercised authority under § 92a of the Federal Reserve Act to grant national banks, by special permit, the authority to exercise trust and other fiduciary powers,[1] namely:

> . . . to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

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[1] Regulatory responsibility for the fiduciary activities of national banks was transferred from the Federal Reserve Board to the Comptroller pursuant to Public Law No. 87-722, 76 Stat. 668 (1962), codified at 12 U.S.C. § 92a (1964).

Section 92a(j) authorizes the Comptroller to issue such rules as he deems necessary to enforce the proper exercise of those powers. In April 1963 the Comptroller issued revised Regulation 9, 12 C.F.R. § 9.18, which authorized for the first time the commingling of managing agency accounts under national banks' fiduciary powers.

The background of Regulation 9 needs brief mention. Since the thirties, banks have been authorized to act as managing agents to purchase and sell stock for a single principal, 1934 *Fed. Reserve Bull.* 609, but the cost of bank management made it prohibitive to offer this service to investors without very substantial assets. For example, the Bank's minimum for an individual managing agency account is $200,000. Prior to 1963, national banks were authorized by the Federal Reserve Board to commingle and invest customers' funds only if held in its capacities as trustee, executor, administrator, or guardian, and funds held as part of a tax-exempt pension and profit sharing or stock bonus plan of employers for the benefit of employees. Regulation F, 12 C.F.R. § 206 (1959 Rev.). The Federal Reserve Board, moreover, had consistently taken the view that common trust funds should not be used as a medium to attract customers primarily seeking investment management of their funds.[2] After the responsibility for regulating bank trust powers was transferred to the Comptroller, that office concluded, after study, that existing regulations should be broadened to extend the advantages of collective investment to managing agency accounts.

The Bank proposed the establishment of a commingled managing agency account pursuant to the revised regula-

[2] 26 *Fed. Reserve Bull.* 393 (1940), 12 C.F.R. § 206.102 (1947); 42 *Fed. Reserve Bull.* 228 (1956); and see 25 Fed. Reg. 12479 (1960), announcing the Board's intention to investigate whether the common trust fund regulations should be amended to exclude inter vivos trusts, because the device of the revocable trust could and had been used to obtain investment management through a common trust fund.

tion.[3] Under the Bank's plan, a customer deposits a minimum of $10,000 under a broad authorization permitting the Bank to invest the funds with those of other participants in the plan. The customer is a principal, and the Bank, his managing agent. The customer receives an undivided interest in the fund, expressed as a "unit of participation." These units are redeemable at net asset value, and are not transferable except to other participants in the plan. No sales load or redemption charge can be imposed.

The Account is registered as an investment company under the Investment Company Act, and the units of participation are registered as securities under the Securities Act of 1933, 15 U.S.C. § 77a (1964). The Bank is both investment adviser to the Account and statutory underwriter for the units of participation issued. The Account is subject to a Committee with the powers of a board of directors, whose members are elected annually by the participants. The Bank sought and received exemptions from provisions in the Investment Company Act which would have required that a majority of the Committee be unaffiliated with the Bank. The Securities and Exchange Commission required that at least two of the five Committee members must be persons unaffiliated with the Bank, but the other three will normally be officers of its Trust and Investment Division.

The Account is managed by the Bank pursuant to a management agreement which must be approved by the participants at their first annual meeting. Thereafter, the contract must be approved annually by the participants or by

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[3] The Bank's plan does not conform in all respects to Regulation 9 as originally issued due to the adjustments required to satisfy the requirements of the Investment Company Act. The plan, as amended, received the Comptroller's written approval under 12 C.F.R. § 9.18(c)(5), and it is expected to set the pattern for other bank-sponsored investment funds. There is accordingly no need to review the provisions of Regulation 9 as it was originally promulgated.

the Committee, including both Committee members unaffiliated with the Bank.

The Account is the functional equivalent of an open-end mutual fund, but there are several differences. The Comptroller's regulations provide that the units of participation or shares may not be marketed through regular channels of public distribution; participation is offered and publicized only through the Trust Department. 12 C.F.R. § 9.18(b)(5)(iii) and (iv) (1968). The Bank's compensation is limited by regulation to the sum of the fees normally charged for separate management of such accounts, namely, ½ of 1 percent per annum of the average net asset value of the fund. 12 C.F.R. § 9.18(b)(12). Finally, and most important, the Account is under the supervision of the Comptroller like other banking functions. This includes review of the fund's investments to see that they are in accordance with sound fiduciary principles. 12 U.S.C. § 481 (1964), 12 C.F.R. § 9.11(d) (1968).

II

Validity of the Account Under the Banking Laws

The District Court held that the Account is unlawful on two grounds: (1) the commingled managing agency account is not a fiduciary activity within the purview of § 92a of the Federal Reserve Act and is not open to State banks under the law of New York, and (2) the maintenance of the fund violates §§ 16, 20, 21, and 32 of the Glass-Steagall Act, 12 U.S.C. §§ 24 (seventh), 377, 378, 78 (1964).

A. *The Federal Reserve Act*

The District Court relied on the differences between the trustee and agency relationships, noting especially the higher standard of care of a trustee, to conclude that a collective managing agency account was not a true fiduciary activity within the purview of § 92a of the Federal Reserve

Act. The differences between the traditional trust relationships of trustee, executor, or administrator and the contractual principal-agent relationship do not, in my view, make the agent any less a fiduciary, nor does commingling of funds, subject to the principal's authorization, change the fiduciary character of the duty owed to each. *Brown* v. *Christman*, 75 U.S. App. D.C. 203, 126 F.2d 625 (1942). The District Court apparently recognized that the Account might pass muster under the phrase authorizing banks to act "in any other fiduciary capacity," but held that it did not qualify as an activity open to competing State banks under the New York law.

Section 100-c of the New York Banking Law specifically authorizes trust companies to commingle funds held in the strict trust capacities, but New York law contains no specific grant of authority to commingle funds held as managing agent. The District Court concluded that the absence of such authority was an implied prohibition. Section 100-c, however, simply permits commingling in cases where the governing trust instrument does not authorize it. The conditions on commingling imposed by § 100-c have not been imposed upon collective accounts authorized by a trust instrument. The real question, therefore, was whether commingling was permissible under the general authority of § 100, which empowers a State bank to act as agent for any lawful purpose and to manage a principal's funds according to the terms of the power conferred upon the bank. N.Y. Bank. Law § 100(1) and (5) (McKinney 1950).

Since the decision of the District Court, the New York State Banking Department has given formal approval of commingled managing agency accounts to two New York banks, stating that the operation of the accounts is authorized by § 100 of the Banking Law. Appellee ICI describes this approval as a defensive response to enable State banks to meet the national banks' competition. This is surely true. Prior to the Comptroller's issuance of revised Regu-

lation 9, no State banks operated commingled managing agency accounts. Still, the Banking Department's action cannot fairly be dismissed as merely following the Comptroller's lead. The question of whether collective accounts are a proper fiduciary activity for banks appears to have been open under both Federal and New York law, and both banking agencies could reasonably have resolved it the same way.

The Bank concedes, of course, that the commingling of managing agency accounts represents a departure from past banking practice of limiting commingling to funds held by the Bank in the traditional trust capacities and as trustee of a pension or profit-sharing trust. Regulation 9.18 permits banks to serve multiple principals under a standard agreement vesting the bank with broad discretion to invest their money, subject to the duties and liabilities of a managing agent, and not a trustee. This is a new and free-wheeling form of fiduciary activity.

I am persuaded, however, that the Comptroller's regulations, together with the protection of the customer *qua* investor afforded by the securities acts, will reasonably assure the proper exercise of this broad fiduciary power. The restrictions imposed by Regulation 9, 12 C.F.R. § 9, secure the Comptroller's powers of examination and supervision of the Account. (§§ 9.8, 9.9.) The rules safeguard the fiduciary relationship by requiring the separation of the Account's funds from other assets (§§ 9.13, 9.18(b)(2)), by enforcing the obligations to refrain from self-dealing and conflicts of interest (§§ 229.10, 9.12, 9.18(b)(8)), and by limiting the Bank's charge to its normal fiduciary compensation (§§ 9.15, 9.18(b)(12)).

The major difference between the Bank's relationship to the customers of the Account and its relationship to the beneficiaries of other management and trust services is the absence of an individually negotiated agreement. The character of the Bank's initial advice and ultimate account-

ability to the customer is necessarily altered by a package deal offered to all comers. This was one reason why the Securities and Exchange Commission required registration of the Account.[4] The provisions for disclosure and participant control contained in the securities laws substantially compensate for the drawbacks of a standardized fiduciary service. The Securities Act of 1933 requires that potential customer-investors receive a prospectus describing the management of the Account, its investment objectives and policies, and the rights of participants. 15 U.S.C. § 77j (1964). Periodic reports and proxy statements must be issued for inspection by both the participants and the Commission. §§ 80a-20(a) and 80a-29(d). Pursuant to the provisions of the Investment Company Act, participants in the Account will elect their directors (§ 80a-16(a)), retain the power to terminate the contract (§ 80a-15(a)(3)), and ratify the selection of auditors (§ 80a-31(a)(2)). The interests of the principals participating in the Account, though not identical, are bound to be similar; and as a group, they possess a measure of control over the management of their money. Dual regulation by the Comptroller and the Commission should assure the proper operation of the Account.

B. *The Glass-Steagall Act*

The District Court held that the Comptroller's authorization of the Account violated four provisions of the Glass-Steagall Act. It held that in the issuance of units of participation, the Bank was engaged in the business of dealing in securities for its own account in violation of §§ 16 and 21, and that the relation between the Bank and the Account was an affiliation or interlocking directorate between a bank and an organization principally engaged in the securities business in violation of §§ 20 and 32 of the Act.

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[4] See Statement of then Chairman Manuel F. Cohen, *Hearings on S. 2701 Before a Subcommittee of the House Committee on Banking and Currency*, 89th Cong., 2d Sess. 132-38 (1966).

(1) *Sections 16 and 21*

Section 16 of the Glass-Steagall Act imposes the following limitation upon bank dealing in securities:

> . . . The business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock. . . . [12 U.S.C. § 24 (seventh).]

Section 21 of the Act prohibits commercial banks from engaging in the business of "issuing, underwriting, selling or distributing" most types of securities.[5] Because the units of participation in the Account are securities, and the Bank is the statutory underwriter under the Securities Act of 1933, the District Court held that the Bank is engaged in the selling and underwriting of securities prohibited by §§ 16 and 21 in operating the Account.

The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors, primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment inter-

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[5] The Glass-Steagall Act permits banks to market government revenue bonds backed by the taxing power of the public authority issuing the bonds. 12 U.S.C. § 24 (seventh). The Comptroller's regulation broadening bank underwriting authority to include revenue bonds was invalidated in *Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S.App.D.C. 173, 392 F.2d 497 (1968).

ests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties. Banks frequently not only invested in speculative securities, but entered the business of investment banking by underwriting original issues. Some of these activities were undertaken directly; others were carried on by securities affiliates formed and controlled by the banks to evade completely the weak restrictions upon direct bank dealings in speculative securities. Section 16 of the Act was addressed to three problems:

> (1) Banks commonly invested their own assets in securities, risking commercial and savings deposits if the securities declined in value.[6]
>
> (2) Direct bank investment in securities created pressure for banks to make unsound loans to maintain the price of securities or the financial position of companies in which the bank had holdings.[7]
>
> (3) Large city banks frequently acted as issuers, or underwriters of blocks of securities, distributing them at a profit through correspondent country banks. The banks' pecuniary interest in the ownership, price, or distribution of securities created incentive to steer customers into investing in what the banks had to sell.[8]

The problem of risk to deposits does not arise here, because the securities in the fund are purchased for the account of the customer, not the Bank. The ICI does claim, however, that the Bank's indirect holdings in the Account

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[6] *Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency*, 71st Cong., 3d Sess. 1055-66 (1931).

[7] *Id.* at 1063-64.

[8] See Address of Senator Bulkley, 75 Cong.Rec. 9912 (1932).

may amount to an interest in individual companies sufficient to influence its credit decisions. The short answer is that, since this indirect risk is present in all bank investments in securities for the account of customers, that problem was not within the contemplation of the Glass-Steagall Act.

With regard to the third abuse treated by § 16, the ICI points out that because the Bank's compensation is tied to the size of the fund, there will be pressure to market the participations to maintain and increase its assets. I agree.[9] But the Bank is under similar pressure to sell all the services of its trust department. The Bank's interest in earning a regulated fiduciary charge bears little resemblance to its interest in earning an indeterminate distributing profit from securities which it owns or underwrites, and the interest forbidden by § 16 is the latter.

Section 21 of the Act prohibits banks from engaging ". . . in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities . . . ." It was enacted to extend the prohibitions of § 16 to members of the Federal Reserve System who were not national banks. Congress did not intend

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[9] The Bank would have us stress the restrictions upon merchandising the Account. The Bank is authorized to offer participations in response to unsolicited requests, to persons on Bank premises, and to existing customers. The Bank's affidavit states that it will accept the customer's money if it is satisfied that the Account's investment policy is suited to his needs. It appears from the mailing to "valued customers," however, that they will be acceptable if they read the invitation, with its caveats, and the prospectus and send in the tear-out authorization with $10,000. The $10,000 minimum should accomplish a measure of natural selection, but the Bank's decision on the customer's suitability is unlikely to be so discriminating that the decision itself is a check on the issuance of participations. At any rate, the merchandising problem is more relevant to the question of the proper exercise of fiduciary powers than to entry into the securities business within the meaning of the Glass-Steagall Act.

to bar those banks from buying and selling securities "for the account of customers," so § 21 appears to add nothing to the argument under § 16. If anything, the language of § 21 confirms the view that Congress was concerned in both provisions with prohibiting bank dealing in speculative securities for the traditional and direct form of distribution profit.[10]

(2) *Sections 20 and 32*

Sections 20 and 32 of the Act were enacted to maintain the separation between commercial banking and securities dealing by prohibiting interlocks and affiliations of personnel. Section 20 forbids certain types of bank affiliation with any organization "engaged principally" in the same brand of securities dealing forbidden as a direct bank activity by § 21. One type of prohibited affiliation, defined in § 221a(b)(3), ordinarily exists when a majority of the directors of a securities organization are also directors of any one member bank.

Section 32 generally prohibits directors, officers, or employees of organizations "primarily engaged" in securities dealing from serving in those capacities for a member bank. The Federal Reserve Board has consistently held that § 32 prohibits bank officials from serving as officials of open-end investment companies because such companies (mutual funds) are primarily engaged in issuing their own shares. 12 C.F.R. § 218.101 (1951). The Board ruled, however, that the Account and the Bank were a single

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[10] Section 21 provides criminal penalties for willful violations. The Attorney General is charged with prosecutions under § 21, and has indicated that, while it is not clear whether the operation of the Account would involve criminal liability, the approval of the banking agencies precludes a prosecution against the Bank. See letter of January 24, 1966, to the Securities and Exchange Commission from Assistant Attorney General Fred M. Vinson, in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency*, *supra*, n. 4 at 588.

entity for purposes of § 32, since the Account would be a department of the Bank except for purposes of the Investment Company Act. So long as the Account remained under the "effective control" of the Bank, the Board stated that there was no prohibited interlock under § 32. 30 Fed.Reg. 12836 (1965), adding 12 C.F.R. § 218.111(j) (1965).[11]

The participants' reserve power to sever the connection with the Bank would be worth something in the event of extraordinary mismanagement, but barring this contingency, the Account will remain part of the Bank's organization. Under the single entity theory, the Bank cannot interlock with itself, but that is not really the point. The clear purpose of §§ 20 and 32 is to prevent banks from entering into prohibited forms of securities dealing by the back door. We have held that the Bank may enter the business of operating the Account by the front door. The organizational pattern imposed to satisfy the requirements of the Investment Company Act does not in this context create a prohibited interlock or affiliation any more than the Account itself constitutes a forbidden excursion into the securities business.

The establishment of a bank-sponsored collective investment fund is not barred by the banking laws. A commingled managing agency account is a descendant of the individual managing agency account and the common trust fund, fitting within the traditional authority of banks to manage other people's money in a fiduciary capacity sanctioned by the Federal Reserve Act. Where the fiduciary tie between the bank and multiple principals is looser, the Comptroller's regulations and the securities laws will

[11] See also the Board's letter of March 31, 1966, to the Bank stating that its ruling would stand even though the Securities and Exchange Commission required that there be two independent directors, or 40 percent of the Committee, instead of the single unaffiliated director proposed by the Bank.

take up the slack. The essential element in this judgment on the applicability of the Glass-Steagall Act is the fact that the securities in the Account are bought and sold for the account of customers. The sale of an investment service to a potentially large number of customers gives rise to obligations under the securities laws, but these do not convert otherwise lawful transactions for the account of customers into prohibited securities dealings within the meaning of the Glass-Steagall Act.

The major consequence of expanded investment service by banks will be a quantitative change in the volume of securities bought, sold, and held by banks. While substantial transactions in securities by banks may be essential for the modern management of their customers' money, an increase in their already massive securities holdings for the account of customers has some disquieting consequences for the underpinnings of corporate accountability and competition in the economy at large.[12] The dimensions of the problem are broader, however, than the banking laws on the books. The Glass-Steagall Act enforces the separation of commercial banking and a particular kind of securities dealing. Its legislative history affords little support and even less guidance for a judicial decision to limit bank transactions in securities for customers because today they differ in degree.

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[12] For recent comment on the power of banks as institutional investors to control so-called publicly held corporations, see *Studies by the Staff of the Cabinet Committee on Price Stability* 52-54 (Jan. 1969). See also a warning that the trend toward conglomerate banking makes it possible for banks to condition access to credit upon the borrower's use of the bank's other services and dealings with its subsidiaries in "The Growth of Unregistered Bank Holding Companies—Problems and Prospects," *Staff Report for the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 2 (1969).

III

Validity of Exemptions From § 10 of the Investment Company Act

The NASD, for its part, claims that the Bank's control of the Account is all too effective. It contests the orders by the Securities and Exchange Commission granting certain of the exemptions from § 10 of the Investment Company Act requested by the Bank prior to registration of the Account as a diversified, open-end management investment company under the Act. The exemptions together permit 3 or 60 percent of the Account's five-member Committee to be persons affiliated with the Bank.

Section 10 of the Act was enacted to protect shareholders of investment companies from exploitation by insiders with conflicting interests in other companies or lines of business by requiring that a certain percentage of directors be free of affiliations which may involve divided loyalties. Without the exemptions, § 10 of the Act would preclude the Account from having a majority of directors who are officers, directors, or employees of (1) a principal underwriter, 15 U.S.C. § 80a-10(b)(2), (2) investment bankers, § 80a-10(b)(3), and (3) a single bank, § 80a-10(c). While the Bank fits each of these statutory categories, the overriding issue is the propriety of the exemption granted from § 10(c) to permit a maximum of three instead of two Bank officers to serve on the five-member Committee. A working majority of Bank directors was essential to allow the Account to function in conformity with the banking laws.

Before considering the exemption from § 10(c), it bears emphasis that there is nothing unusual in the fact that the Bank as investment adviser has majority control of the Committee of the Account. Open-end investment companies have traditionally been controlled and managed by their investment advisers; investors are buying their advice. Section 10(a) of the Act provides that 60 per-

cent of the directors of an investment company may be affiliated with the investment adviser. Section 10(d), moreover, permits certain types of "no-load" funds to have only one unaffiliated director if they meet specified conditions. The Bank sought but was denied an exemption which, if granted, would have enabled it to have only one unaffiliated Committee member.[13]

Given these facts, the NASD's assertion that the Committee will abdicate its supervisory responsibilities because the Bank has "effective control" of the Account in the eyes of the banking authorities requires a showing of something more than the normal pattern of majority control by an investment adviser. Nothing in the Comptroller's regulations still applicable precludes the Committee from exercising its responsibilities. Although Regulation 9, as originally promulgated, did not take account of the requirements of the Investment Company Act, all provisions of Regulation 9 inconsistent with that Act were superseded by the Comptroller's written approval of the Account in the form necessary to satisfy the Securities and Exchange Commission. The Bank's majority control for purposes of day-to-day management of the fund is a false problem. The real issue is whether exemptions allowing an extra director on the Bank side will undercut the Committee's watchdog role in areas of potential conflict of interest.

Section 6(c) of the Investment Company Act empowers the Commission to grant exemptions from the Act, or any rule or regulation adopted under it, ". . . if and to the extent that such exemption is necessary or appropriate in

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[13] Notwithstanding the provisions of §§ 10(a) and 10(b)(2), § 10(d) permits all but one of the directors of certain types of "no-load" funds to be affiliated with the investment adviser if certain conditions are met. 15 U.S.C. § 80a-10(d). To qualify for the exception under § 10(d), the Bank would have had to register as an investment adviser, principally involved in that business. An exemption from this condition was denied.

the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions" of the Act. 15 U.S.C. § 80a-6(c). The Commission has exercised this authority to exempt persons not within the intent of the Act and generally to adjust its provisions to take account of special situations not foreseen when the Act was drafted. *Transit Investment Corporation,* 28 S.E.C. 10, 16 (1948); *The Atlantic Coast Line Company,* 11 S.E.C. 661, 666-67 (1942).

In granting the exemptions at issue, the Commission first observed that the Account differs on the one hand from the bank-dominated securities affiliates of the twenties whose abuses inspired § 10[14] and, on the other, from open-end investment companies (mutual funds) not subject to the supervision of the Comptroller. For these reasons, it was appropriate to consider whether a bank-sponsored fund was a type of investment company requiring the standard measure of unaffiliated directors or whether exemptions were justified by its novel characteristics. The Commission concluded that the risks of conflict of interest would be adequately controlled by the provisions of the Investment Company Act still applicable, supplemented by the Comptroller's regulations, and that the exemptions would permit the establishment of a desired new investment

[14] Securities affiliates were organized by banks to evade the prohibition against investment of bank funds in common stocks. The affiliates, usually closed-end investment companies, often took loans from the sponsor banks, secured by the stock held by the affiliate, and then used the borrowed funds to trade or invest in the bank's stock or in other securities in which the bank had an interest. The affiliates also made loans of investment company funds to the bank. Shareholders of the affiliate and depositors of the bank were both on the losing end of these arrangements. The abuses were detailed in a comprehensive study submitted to Congress by the Commission prior to the adoption of the Glass-Steagall Act. *Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission,* Pt. 1, H.R. Doc. No. 707, 75th Cong., 3d Sess. 94 (1938).

medium, still subject to all the safeguards necessary for the protection of its investors.

The conflict of interest problems created by bank affiliation with investment companies are of a different order when the fund is sponsored by the bank. In the proceedings below, the Commission considered four danger zones, previously cited by former Chairman William L. Cary in testimony before Congress recommending regulation of collective investment funds,[15] and urged by the NASD as reasons for denying the exemptions.

A. *Retention of substantial cash deposits for the Account in the Bank*

The Commission discounted the danger that the Bank might retain an unwarranted portion of the Account's assets in cash in order to earn money for the Bank, stating that the temptation to leave funds uninvested would be contrary to the Account's stated policy of investment for long-term growth of capital and income, and to the Bank's interest in having the fund's assets increase. The interest in increasing the assets in the fund dictates not only that funds already held be invested in growth securities, but also, as we have seen, creates pressure to increase the number of participants. The undisputed fact that the Account will compete with the mutual fund industry can be expected to inhibit retention of its income-producing assets in the form of lopsided cash deposits. There is an important point of convergence between the interests of the Bank directors *qua* commercial bankers and their interest in the success of an investment medium offered as part of the Bank's services, a convergence not present when Bank personnel serve as directors of independent investment companies.

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[15] *Hearing on Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, Before a Subcommittee of the House Committee on Government Operations* [Hereinafter *Hearing on Common Trust Funds*], 89th Cong., 1st Sess. 11-12 (1963).

The Comptroller's regulations, moreover, state that funds held in a fiduciary capacity by banks shall not be held uninvested or undistributed for a period longer than is reasonable for the proper management of the particular account. 12 C.F.R. § 9.10(a). Observance of this regulation is policed through examinations of bank trust departments which occur at least three times in every two years. 12 U.S.C. § 481. The Commission reasonably concluded that the Bank's interest in holding the Account's assets in cash was offset by this combination of the carrot and the stick.

B. *Use of Account investments to shore up Bank loans*

Considered under § 16 of the Glass-Steagall Act was the danger that the Bank might make unsound loans to shore up companies in which it had made investments for the Account. From the standpoint of the Investment Company Act, the risk is that the Bank will make bad investments for the Account to shore up unsound loans. In a letter to the Senate Committee on Banking and Currency, Chairman William McChesney Martin of the Federal Reserve Board explained why this area of risk was not regarded as significant.

> For many years banks have participated in the management of employee-benefit funds and other fiduciary accounts that hold stocks and other securities in an aggregate amount far exceeding those held by the entire mutual fund industry. The examinations conducted by bank supervisory agencies have disclosed practically no such misuse by banks of their investment advisory and management functions. In the case of managing agency funds, an additional safeguard is the prophylactic restrictions and requirements of the Investment Company Act of 1940, particularly publicity of the financial transactions of registered investment companies, which almost inevitably would

expose such malfeasance. A further deterrent would be the adverse impact on a collective fund's performance—its comparative financial record—if any of its resources were used to make unprofitable investments; the detrimental effect on sales of participations might outweigh any benefits the bank could reasonably expect from its breach of fiduciary duty.[16]

In addition to taking note of the Comptroller's supervision of investments, the Commission cited its own supervision of transactions involving a joint arrangement between the Bank acting as a principal and the Account under the insider provision of § 17(d) of the Act, 15 U.S.C. § 80a-17(d),[17] and concluded that the margin for misconduct of this sort was narrow.

C. *Purchase by the Account of securities underwritten by the Bank*

The danger that the Account's funds might be used to promote the Bank's investment banking business is relevant generally to the exemption from § 10(c) and specifically to the exemption from § 10(b)(3). Section 10(b)(3) would have required that a majority of the directors of the Account be unaffiliated with an investment banker. The Bank is in the investment banking business to the extent that it participates in syndicates which underwrite debt securities of governmental authorities.

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[16] Letter dated December 14, 1967, from William McC. Martin, Jr., Chairman, Federal Reserve Board, to Senate Committee on Banking and Currency, in *Hearings Before the Senate Banking and Currency Committee on Amendment No. 438 to S. 1659*, 90th Cong., 1st Sess. 1223-26 (1968).

[17] Shoring up loans or acquiring banking business in connection with the purchase of stock for the fund may be such a joint transaction. Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 HARV. L.REV. 435, 451 (1968).

I concur in the Commission's judgment that there is no basis for concern that the Bank can or will use the Account to further its limited investment banking business. The Account is primarily a stock fund. It is not permitted to purchase any securities from the Bank, 15 U.S.C. § 80a-17(a), and cannot purchase government securities from another member of a syndicate where the Bank participates as principal underwriter. 15 U.S.C. § 80a-10(f). The Commission conditioned the exemption by prohibiting purchases from syndicate members even after the syndicate has terminated but the members hold unsold allotments.

D. *Allocation of brokerage to existing or potential Bank customers*

Former Chairman Cary observed that banks often distribute brokerage to those brokers with whom the Bank has or seeks reciprocal dealings, and that this may be contrary to the best interests of the Account's investors. This is one breed of the "bird-dog" problem presented when bankers direct investment business toward companies whose banking business they desire in return. Such a practice would, of course, depart from the brokerage policy set forth in the prospectus. The Bank's stated objective in placing orders is to obtain the most favorable prices and execution of orders and, secondarily, to deal with brokers and dealers who provide the Bank as investment adviser with supplementary research and statistical information or market quotations.

Reliance on the Bank's representations is not wholly satisfying. Allocation of brokerage for the Bank's benefit is a subtler form of self-dealing than questionable purchases of securities or maintenance of an undue cash balance, and one less amenable to control through disclosure and supervision by the agencies. Nonetheless, brokerage may be improperly distributed in the course of banks' already extensive securities purchases for the account of

customers, and it is appropriate to point out that Congress apparently did not consider this threat to be of critical significance when it exempted common trust funds from the Act entirely. See 15 U.S.C. § 80a-3(c)(3).

The Commission's orders do not rest upon a sanguine assumption that there are no conflicts of interest incident to bank-sponsored investment funds, but rather proceed from a showing that the dangers are significantly different from those involved in other types of bank-investment company affiliations. Because the Bank earns only a regulated fiduciary charge tied to the amount of the Account's assets, the Bank-affiliated directors' interest in attracting more customers coincides with the interests of investors and to some degree counteracts the incentive to hold the fund's assets in the form of commercial deposits. The restrictions upon Bank underwriting and Bank transactions with the Account make it unlikely that the Bank can profit by using the fund to unload or backstop its bad or indifferent investments, a major function of the bank-dominated securities affiliates of the twenties. To the extent that such hazards as improper brokerage allocation remain, the Commission could reasonably have concluded that two independent directors would perform adequately as watchdogs, with the enforcement powers of the Comptroller adding extra teeth.

Finally, the NASD claims that the Commission made an expedient bargain in granting the exemptions in order to head off legislation to exempt bank-sponsored funds from the securities laws. It is true that the Commission's assertion of jurisdiction over such funds generated legislative proposals, along with some friction between agencies of the Executive;[18] but I view the decision differently. Taking due account of the reduced potential for conflicts of interest in bank-sponsored funds and the near-complete

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[18] *Hearing on Common Trust Funds, supra,* n. 15 at 2-3 and 161-64.

coverage of the securities laws, the Commission determined that the supervision of the Comptroller would compensate for the absence of an independent tie-breaker on the Committee of the Account. This was a fair trade.

IV

Standing

A. *Standing of the Investment Company Institute*

The ICI claims standing to challenge competition from banks on the ground that the Comptroller has authorized a competitive activity specifically prohibited by Congress in the Glass-Steagall Act. *Cf. Baker, Watts & Co.* v. *Saxon*, 261 F.Supp. 247 (D.D.C. 1966), *affirmed sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 129 U.S.App.D.C. 173, 392 F.2d 497 (1968); *Saxon* v. *Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968).

As a general rule, competitors lack standing to challenge competition created or enhanced by governmental action, even if it is illegal, unless they can claim the benefit of an implied or express statutory aid to standing. *Pennsylvania Railroad Co.* v. *Dillon*, 118 U.S.App.D.C. 257, 335 F.2d 292, *cert. denied sub nom. American S.S. Co.* v. *United States*, 379 U.S. 945 (1964). The Glass-Steagall Act was not intended by Congress to protect mutual funds from competition from banks, so they do not have standing as intended beneficiaries; and the Act contains no aggrieved party provision. *Contrast Hardin* v. *Kentucky Utilities*, 390 U.S. 1 (1968); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The District Court held, however, that the ICI was an implied, though not an intended beneficiary of the Glass-Steagall Act, and granted it standing to sue as a private attorney general to enforce the separation between commercial banking and securities dealing, despite the absence of an aggrieved party provision to support that role.

We are all agreed that this holding is exceptional, but so is this case. While the majority concludes from the cases that there is no satisfactory authority for standing, I find in those cases no reason to deny standing, and good reason to grant it. First, the authorities for the rule denying competitors standing to challenge unlawful competition are inapposite. Second, the basic justification for entertaining competitors' suits to challenge administrative action as statutory aggrieved parties, intended beneficiaries, or licensees is to vindicate a public interest, and not a private right. The absence of a statutory aid to standing in this case is adventitious, and I would grant appellants standing to assert the public interest without it.

1. *Competitors' standing to challenge unlawful competition without a statutory aid to standing*

Analysis of suits by competitors confirms the Supreme Court's observation that "the various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). The general rule denying standing to competitors who can claim no statutory aid to standing is derived from two types of cases in which their interest in attacking allegedly unlawful competition has not been found reasonably proportionate to the burden on governmental agencies of defending against such suits. In one class of cases, privately owned utilities have been denied standing to challenge legislative public power programs. *See e.g., Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118 (1933); *Kansas City Power & Light* v. *McKay*, 98 U.S.App.D.C. 273, 225 F.2d 925, *cert. denied*, 350 U.S. 884 (1955). These cases draw much of their vitality from considerations of separation of powers and the

doctrine "that a person may not maintain a suit to enjoin the use of Government funds, even if such use is claimed to be in violation of law." In suits of this nature, "[t]he fact that the plaintiff is suffering an economic detriment from competition assisted by a loan or grant of Government funds, does not give him standing to sue." *Baker, Watts & Co.* v. *Saxon,* 261 F.Supp. at 249. *Cf. Saxon* v. *Georgia Assn. of Ins. Agents,* 399 F.2d at 1020-21 (concurring opinion).

There are similarly sound policy reasons why competitive injury does not confer standing to challenge administrative decisions affording some incidental aid to another competitor or group of competitors in an industry. Minor or speculative economic injury is not worth burdening the agencies and the courts with skirmishes among businesses over comparative advantages resulting from allegedly illegal agency action. *See Pennsylvania Railroad Co.* v. *Dillon,* 118 U.S.App.D.C. at 262, 335 F.2d at 297.

These, then, are the considerations underlying the many opinions which deny standing with the homily that competition is our economic norm. To acknowledge that cases denying standing to competitors are governed by (1) considerations of separation of powers, and (2) a desire to limit actions against the government, rather than by rigid abstract rules, seems to me only to do justice to the subtleties of standing as an element of justiciability. In suits by competitors, the nature of the claim is plainly relevant to the status of the economic interest asserted as a basis for standing. Here the ICI does not challenge the constitutional propriety of legislation or government spending. It does not ask this court to invoke due process or substantial evidence standards to afford it a remedy for marginal injury from an illegal administrative action. It points out, instead, that national banks operated under a regime of enumerated powers and prohibitions carefully laid down by Congress, and asks us to decide whether the competition authorized by the Comptroller violates specific

provisions of the banking laws, one of which carries criminal penalties for bank entry into the securities business. 12 U.S.C. § 378.

In these circumstances, to put the ICI out of court with the incantation that competition is our economic norm is insupportable in law and fact. No case stands for the rule that authorization of novel and prohibited—even criminal—business activity by administrative agencies is part of the rough-and-tumble of a competitive market. And in point of fact, toe-to-toe competition between mutual funds and commercial banks has never been the norm. The Comptroller's action introduces a powerful new element into a market previously closed to commercial banks by the rulings of the Federal Reserve Board, enforcing the same prohibitions now largely committed to the supervision of the Comptroller. This case falls outside the authorities for the general rule that competitors lack standing to challenge illegal competition.

We are not locked into conventional concepts of unfair competition in assessing a competitor's interest for purposes of standing. *Cf.* Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV.L.REV. 255, 265-66 (1961). It would not be far-fetched to conclude that competition illegally authorized by an agency which has allegedly ignored statutory prohibitions is unfair. But while there is arguably a private interest meriting protection here, it is plain that the overriding interest in enforcement of the Glass-Steagall Act is a public one. The question is whether the ICI may assert the public interest without a statutory aid to standing.

2. *Competitors' standing to challenge unlawful competition with a statutory aid to standing*

(a) Aggrieved party statutes

Since the decision in *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), competitors have been granted standing to challenge administrative action under statutory aggrieved party provisions despite the fact that the statute does not require that their competitive interests be given weight by the agency. Competitors need not even be members of the industry subject to a specific regulatory statute to sue under it, so long as they can show aggrievement by administrative action pursuant to the statute. *See Clarksburg Publishing Co.* v. *F.C.C.*, 96 U.S.App. D.C. 211, 225 F.2d 511 (1955); *Philco Corp.* v. *F.C.C.*, 103 U.S.App.D.C. 278, 257 F.2d 656 (1958), *cert. denied*, 358 U.S. 946 (1959). Competitors whose interests and injuries are not legally protected or even immediately relevant to a regulatory jurisdiction are given standing as private attorneys general to represent the public interest in the proper administration of a regulatory scheme. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 14 (1942); *Associated Industries* v. *Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

(b) Intended beneficiaries

Long before *Sanders*, the Supreme Court had held that competitors have standing to challenge unlawful competition when they can show that a statute was intended to afford some protection to their economic interests. *The Chicago Junction Case*, 264 U.S. 258 (1924). The *Chicago Junction* theory is the only logical support for cases holding that a license, grant, or other property interest makes some competitors more worthy plaintiffs than others. The significance of a license for standing is not its conventional status as a property right but the fact that licensing may

indicate a legislative intent to limit competition in a market by regulating entry. Licensees may be intended beneficiaries entitled to rely on a regulatory scheme, with standing to enforce it. *See Frost* v. *Corporation Comm'n*, 278 U.S. 515 (1929) (Dissenting opinions of Justices Brandeis and Stone).

In *Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958), the Supreme Court granted standing to a motor carrier to challenge the operation of a new carrier which had not obtained a permit required by statute on the ground that the first carrier was adversely affected and contended that the competition was prohibited by a valid city ordinance. 357 U.S. at 83. The holding on standing does not even refer to the fact that the plaintiff carrier had a license; the point was that one party was lawfully in business and one allegedly was not. In such cases, the limitation on the number of entrants in a market is not really intended to benefit a licensee, but to assure to the public an adequate level of services from economically viable enterprises. The licensee-plaintiff is vindicating a public interest. His private interest is his reliance on the rules protecting the public.

Since the enactment of aggrieved party provisions giving competitors standing in most regulated industries, the intended beneficiary theory has conferred standing in exceptional cases where there is no express statutory aid to standing, notably in an action against the TVA and in the spate of suits against the Comptroller. In *Hardin* v. *Kentucky Utilities*, 390 U.S. 1 (1968), the Supreme Court granted standing to a private utility to adjudicate a dispute over statutory area limitations on the expansion of TVA, a comparatively clear case of market allocation by the legislature.

Competitors in regulated industries have been granted standing as intended beneficiaries of a regulatory scheme where the statute (1) requires equal treatment of competi-

tors (*Chicago Junction*), (2) regulates the number of entrants into a market (*Chicago* v. *Atchison, Topeka & Santa Fe*), and (3) allocates markets among competitors (*Hardin*). In each case the legislature has concluded that the public interest in an adequate level of efficient services is furthered by some restriction on competition. When private parties sue to enforce those restrictions, they are necessarily asserting a distinct public interest more important than their own.

3. *Competitors' standing to sue the Comptroller*

The banking laws affect competition by keeping banks out of specified business activities, but the limitation of competition in certain markets is a by-product of prohibitions whose overriding purpose is to protect the banks and their depositors' fortunes. Two courts have nonetheless granted standing to a group of insurance agents and a data processing firm to challenge rulings of the Comptroller authorizing banks to enter their bailiwicks on the ground that certain provisions of the banking laws indicate an intent to protect their interests. In *Saxon* v. *Georgia Assn. of Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968), the majority held that § 92 of the National Bank Act, 12 U.S.C. § 92, permitting banks to act as insurance agents in cities of 5,000 inhabitants or less was intended to protect insurance agents in larger towns from bank competition. But it seems more likely that the sale of insurance was never an activity within the intent of the statutory provision granting banks "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. § 24(7), and that the general ban on bank entry into the insurance business was qualified solely for the purpose of strengthening weak banks in small towns. The interest of insurance agents in *retaining* the implied prohibition in larger communities is unrelated to the intent of Congress in enacting it in the first place. 399 F.2d at 1019 (concurring opinion).

Similarly, in *The Wingate Corp.* v. *Industrial National Bank,* 408 F.2d 1147 (1st Cir. 1969), the plaintiff data processors argued that solicitation by banks of data processing business from the business community at large was not a power incidental to banking, and that recently enacted limitations on the data processing activities of bank service corporations, jointly formed by small banks to enable them to purchase computer equipment, were intended to protect independent data processing companies.[19] The First Circuit accepted this argument, relying heavily upon the fact that the National Society of Public Accountants had proposed the limiting amendment. But the fact that the organized accountants pressed for an explicit limitation does not mean it was designed to protect them. Enterprises that lobby for legislation are not necessarily transformed into intended beneficiaries if it passes.

I agree that the insurance agents and the data processors in these two cases did have standing, but I am not persuaded that the specific provisions relied upon by the courts were intended to create protected classes of competitors any more than the Glass-Steagall Act was intended to benefit mutual funds or investment bankers. *Cf. Baker, Watts & Co.* v. *Saxon,* 261 F.Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.,* 119 U.S.App.D.C. 173, 392 F.2d 497 (1968). It is fruitless to look for an intent to protect these businesses from competition from banks in legislation designed to restrict or prohibit bank activities for reasons having nothing to do with competition. The critical question of congressional intent is this: Did Congress intend to immunize rulings of the Comptroller from judicial review? This is the critical question because substantial immunity is the consequence of denying standing to competitors. They are the only parties likely to challenge the authorization of prohibited bank activity. *Cf. Office of Communication of the United*

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[19] *Contra, Assoc. of Data Processing Serv. Organ., Inc.* v. *Camp,* 406 F.2d 837, *cert. granted,* 37 U.S.L.W. 3489 (June 23, 1969).

Church of Christ v. *F.C.C.*, 123 U.S.App.D.C. 328, 335, 359 F.2d 994, 1001 (1966). The intended beneficiaries of the banking laws, if the class is narrower than the public, are bank customers who have no immediate and compelling interest in litigation to further long-term sound banking.

It is fortuitous that there is no aid to standing for these plaintiffs. If underwriters, insurance agents, data processors, and securities dealers are right that banks are prohibited by law from entering their businesses, Congress would never have foreseen that administrative rulings under the banking laws would substantially affect their economic interests. Judging from the purpose and pattern of the banking laws, the question of aggrieved non-bank competitors never came up.

This conclusion finds support in the fact that when Congress anticipated competition problems, it dealt with them in specific terms, notably in provisions of the banking laws equalizing the legal conditions of competition between state and national banks. In dozens of cases, state banks, and recently a state banking agency have had standing to challenge the authorization of new branches of national banks in violation of the statutory limitation of national bank branching to areas where state branches are permitted. 12 U.S.C. § 36(c). *See e.g.*, *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965); *Nuesse* v. *Camp*, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967).[20] Thus, under the usual rules of standing, a state bank can enjoin illegal branching by national banks, but there is no party who can sue to enforce the separation between commercial banking and the securities business. Given the relative triviality of the threat to the banking

[20] Section 92a of the Federal Reserve Act, 12 U.S.C. § 92a, authorizing national banks to act in any other fiduciary capacity open to state banks in the locality, discussed, *supra*, pp. 8-9, indicates a similar concern for equalizing the ground rules of competition between state and national banks.

system posed by outlaw branch banks as compared to the menace of illegal securities dealing, this result is too bizarre to have been intended by Congress.

Disappointed license applicants can call the Federal Communications Commission to account for its decisions in the name of the public. Regulated carriers and state banks may challenge unlawful competition because courts have inferred some protection to their interest from a regulatory scheme. In both cases, competitors' suits are furthering the public interest at stake in the rules. All that is missing in this case is a "logical nexus" between the competitive interest of the mutual fund industry and the aims of the banking laws. *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). It is missing because Congress had more important interests in mind.

Principles of standing in competitors' suits have operated as rules of thumb to sort out proper plaintiffs and legal issues of competition deemed appropriate for judicial resolution. Both are present here. It is not disputed that the members of the ICI are aggrieved by the Comptroller's ruling. Bank-sponsored diversified investment funds open to $10,000 customers will compete for the cream of the market now cornered by the mutual funds. The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of a statutory aid to standing.[21]

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[21] The commentators agree that a conventional "legally protected interest" or statutory aid to standing should not be required in all cases. Professor Davis has long maintained that § 10 of the Administrative Procedure Act, 5 U.S.C. § 701 (Supp. II 1965-66), accords a right of review to any person aggrieved in fact by administrative action. 3 K. C. Davis, ADMINISTRATIVE LAW TREATISE § 22.02 (1958); *Standing: Taxpayers and Others*, 35 CHI.L.REV.

B. *Standing of the National Association of Securities Dealers*

The NASD claims standing to seek judicial review under § 80a-42(a) of the Investment Company Act, which accords a right of review to "[a]ny person or party aggrieved by an order issued by the Commission . . . ." 15 U.S.C. § 80a-42(a). It relies principally on the case of *F.C.C.* v. *Sanders Bros Radio Station,* 309 U.S. 470 (1940), to support its standing to sue as a private attorney general to vindicate the public interest in the proper enforcement of the Investment Company Act. This standing issue is settled by *Sanders.* There is no requirement that a plaintiff establish a legally protected private interest to sue under "party aggrieved" statutes. *Office of Communication of United Church of Christ* v. *F.C.C.,* 123 U.S.App.D.C. at 335, 359 F.2d at 1001. The only question is whether the NASD is

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601, 619 (1968). Aggrievement in fact is all that is needed to create a case or controversy in the constitutional sense. There is some support for Professor Davis' interpretation in the legislative history of § 10, but most courts, including this circuit, have rejected it. *Kansas City Power & Light* v. *McKay,* 96 U.S.App. D.C. 273, 225 F.2d 924, *cert. denied,* 350 U.S. 884 (1955).

Professor Jaffe views the private attorney general theory grafted on to aggrieved party provisions as a variant of the common law public action, rooted in English and American state law. If a party is suing as a private prosecutor, Professor Jaffe regards his individual interest as irrelevant, but in such cases, "judicial discretion in terms of the size, urgency, and clarity of the issue at stake" should be exercised in the decision to take jurisdiction. Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV.L.REV. at 286-87.

The theory that standing may be accorded as a matter of discretion when the plaintiff is aggrieved in fact combines the two commentators' approaches. *Curran* v. *Clifford,* No. 21040 (D.C. Cir., decided Dec. 27, 1968), *opinion vacated, petition for rehearing en banc granted* April 3, 1969. These approaches would support a finding of standing to challenge administrative action where (1) the plaintiff is aggrieved, or (2) the question presented is important, urgent and susceptible of judicial resolution, or (3) both conditions are present.

aggrieved by the Commission's orders granting the exemptions from the Act to the Bank.

The NASD represents about 3,700 registered brokers or securities dealers. Most of its members sell shares in mutual funds to investors and are compensated by sales commissions from the "load" charged by the funds. The Bank's commingled investment Account and similar bank-sponsored funds sure to follow[22] are an addition to the group of "no-load" funds whose shares are not sold at a commission by NASD members. No one denies that bank-sponsored collective investment funds will provide substantial competition to both "load" and "no-load" mutual funds. Limitation of sale of participations to customers with a minimum of $10,000 to invest does not narrow the area of competitive overlap enough to make probable injury insubstantial. Surveys indicate that individual sales of $10,000 or more have accounted for about half the mutual fund industry's total dollar sales.[23] NASD members stand to lose commissions earned from the cream of the business. This is enough to show that they are aggrieved parties under § 80a-42(a).

It is clear, moreover, that the NASD is aggrieved as a result of the Commissioner's orders. Analysis of the legal problems in establishing the Account in conformity with the banking laws confirms the Bank's concession that without the exemptions, it would be "effectively precluded"

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[22] Speaking of its exemption decision, the Commission has stated: "A pattern has thus been set which other banks may follow if they see fit." *Hearings on S. 2704 Before a Subcommittee of the Senate Committee on Banking and Currency*, 89th Cong., 2d Sess. 138. At the hearings, the American Bankers Association and individual banks demonstrated great interest in commingled accounts. *Ibid.* at 31-61.

[23] See testimony of an industry representative in *Hearings on S. 2704 Before a Subcommittee of the House Committee on Banking and Currency*, *supra*, n. 22 at 96.

from operating the Account. Both conditions of standing to sue under the aggrieved party provision are met.

For these reasons, I join in the decision of the court.

BURGER, *Circuit Judge*, concurring:* Although I am unable to join in the rationale underlying Judge Bazelon's basis for standing of Appellees, nonetheless I am prepared to agree with the result in order to make a majority holding for review of the merits of a subject of such importance. I do so in order to reach consideration of the merits for such aid as some examination at our level may be useful to further judicial review.

(1)

As I see it, there are three generally accepted theories of standing which guide the courts in ascertaining whether a plaintiff is the appropriate "party seeking to get his complaint before a federal court." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). The first emerges from those cases involving a statutorily defined basis for standing. *See, e.g., Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942); *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The second evolves from those cases where the plaintiff holds a public license, grant, or recognized property interest which supports his assertion of litigable rights. *See, e.g., Frost* v. *Corporation Com'n*, 278 U.S. 515 (1929); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds*, 379 U.S. 411 (1965). A third theory of standing centers around a finding of intended "statutory protection" which has been bestowed upon the plaintiff thereby entitling him to sue in order to preserve the interests which the statutory scheme has found to be worthy of

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*Consistent with the views herein expressed which are directed to *First Nat'l City Bank* v. *I.C.I.*, No. 21,661, I concur in Judge Bazelon's finding of standing as respects *NASD* v. *SEC*, No. 20,164 and join in the disposition on the merits in that case.

protection. This third concept of standing supported the development of a less easily identifiable strain of decisions focusing on a theory of "unlawful competition."

The "unlawful competition" theory as a basis for standing would seem to have two distinct definitional interpretations: (1) "to compete in any manner, whether legal or illegal techniques are utilized, is 'unlawful competition'"; (2) "to engage in non-prohibited competition by utilizing techniques or engaging in activities which are in themself illegal is 'unlawful competition'." Under the former interpretation, either no one may enter the competition in a given kind or area of endeavor or the particular party seeking to enter the competition has been prohibited from doing so in order to protect those parties already pursuing the activity under some grant, franchise or license. Under the latter interpretation, competition per se is not proscribed but the very conduct which constitutes the competition is in itself illegal. In my view, the first interpretation is a valid one which necessarily emerges from the recognized desire to "protect" extant interests and can properly form the basis for a claim of standing. The second finds no support in a close analysis of the myriad cases reviewing the prerequisites to standing, is a misinterpretation of the conceptual genesis of the theory of unlawful competition, and cannot support a claim of standing.

An illustration of this can be seen in the distinction drawn in the recent *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-6 (1968) case. There, the Supreme Court explained that:

> [T]he economic injury which results from *lawful competition* cannot, in and of itself, confer standing on the injured business to question the *legality* of any aspect of its competitor's *operations* (emphasis added).

The reasonable corollary of this proposition would be that a party could question the legality of its competitor's oper-

ations if, independently, it could demonstrate that the competition per se was "unlawful." In its subsequent analysis,[1] the Court made clear that by utilizing the term "unlawful competition" it meant to preserve the operative distinction between an evaluation of the lawfulness of the competition itself and an evaluation of the legality of the particular conduct which produces the competition.[2]

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[1] In the language following the above-quoted statement, the Court continued:

> But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive inerest, the injured competitor has standing to require compliance with that provision.

390 U.S. at 6.

[2] This court recently recognized this distinction in *Pennsylvania R.R. Co.* v. *Dillon*, 118 U.S. App. D.C. 257, 259-60, 335 F.2d 292, 294-95, *cert. denied sub nom. American Hawaiian S.S. Co.* v. *Dillon*, 379 U.S. 945 (1964):

> "Legal wrong," as we have only recently noted, is the invasion of a legally protected right. *See Gonzalez* v. *Freeman*, *supra*, 117 U.S. App. D.C. at 186 n. 6, 334 F.2d at 576 n. 6. Thus, in order to make out a claim of "legal wrong" under Administrative Procedure Act § 10(a), appellants must assert some legally protected right to be free of the competition . . . . This court has very recently spoken on this aspect of standing. When "Congress has not given them any such standing by express or implied provision of statute * * *, mere economic competition made possible by governmental action (even if allegedly illegal) does not give standing to sue in the courts to restrain such action. [citations omitted] For purposes of standing in this case, the sufficiency of appellants' allegation of "legal wrong" thus depend upon congressional intent to bestow upon them a legal right to protection from such competition.

To resolve the standing question the Court did not find it necessary to inquire into the legality or illegality of the implementing operations which the Tennessee Valley Authority was to utilize to enter the market for selling electricity in the areas in question.[3] All that was necessary was a finding that "one of the primary purposes of the area limitations in § 15d of the [Tennessee Valley Authority Act of 1933 as amended] was to protect private utilities from TVA competition." *Id.* at 6. An area limitation, of course, lends itself to ready interpretation, hence competition per se by TVA would be "unlawful" if TVA had in fact encroached upon the market area which had been reserved for the local utility companies and from which TVA's entry had been prohibited. Because Kentucky Utilities Co. was a member of the class so meant to be protected, it had standing to litigate to obtain an adjudication of its substantive rights under the protective statutory scheme, and "no explicit statutory provision [was] necessary to confer standing." *Id.* at 7 (footnote omitted).

The rationale underlying this finding of standing is that Congress affirmatively intended Kentucky Utilities to be protected from TVA competition. In essence, it was a clearly identifiable beneficiary of a statutory grant of protection, and as such, it was entitled to sue to protect the rights conferred. Whether TVA's operations which led to the competition were in themselves legal or illegal was irrelevant to the determination of Kentucky Utilities' standing.

In addition to these three categories of standing cases, some hybrid variations—some of which are valid, others not—have emerged. They include: (1) the *Flast* v. *Cohen*,

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[3] Significantly, the Court finally concluded that TVA "could . . . properly make its low-cost power available to consumers in this . . . area . . . ." 390 U.S. at 5. Therefore, the Court's resolution of the standing issue cannot be evaluated as a rationalization prompted by its determination that Kentucky Utilities Co.'s substantive rights had been violated.

supra, provision for taxpayer challenges of federal expenditures allegedly in violation of specific constitutional limitation; (2) the unique application of the "consumer aggrievement" concept articulated in *Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966), pursuant to the "person aggrieved" provision of the Federal Communications Act, 47 U.S.C. 309(d) (1964); (3) the discretionary standing theory broached in *Curran* v. *Clifford*, No. 21,040 (D.C. Cir., Dec. 27, 1968), *opinion vacated, petition for rehearing en banc granted*, No. 21,040 (D.C. Cir., April 3, 1969); (4) the concept that "aggrievement in fact" is sufficient to give a party standing to challenge agency action under § 10 of the Administrative Procedure Act; (5) the improper utilization of the "unlawful competition" theory discussed *supra* and employed by some courts which have granted standing in cases involving recent promulgations by the Comptroller of the Currency.[4]

(2)

Against this background we should examine Appellees' claim of standing in the present litigation. As set forth in the preceding opinion, Appellee-Institute is a national association representing 177 open-end management investment companies commonly designated as "mutual funds" and the 88 investment advisers and 78 principal underwriters of these funds. The mutual fund members of the Institute represent 94 percent of all such companies in the United States. The Institute membership also includes several investment advisers and principal underwriters of individual mutual funds which are individual Appellees in this suit.

The major basis for Appellees' claim of standing to challenge the Comptroller's regulations is that the entry of the

[4] For an extensive collection of the recent cases involving "unlawful competition" as a theory for challenging activity authorized by the Comptroller see *Saxon* v. *Georgia Assoc. of Independent Ins. Agents, Inc.*, 399 F.2d 1010, 1017 n. 6 (5th Cir. 1968). *See also* Judge Bazelon's opinion at pp. 30-34.

national banks into the so-called "mutual fund industry" would constitute "unlawful competition" which Appellees as representatives of the industry may challenge.[5] However, an analysis of the facts of this controversy illustrates Appellees' reliance on an incorrect interpretation of the concept of "unlawful competition." To perceive the faulty basis of the claims of Appellees, their precise contentions must be studied.

> Appellees are complaining of unauthorized administrative action creating a form of competition specifically prohibited by Congress in the Glass-Steagall Act. The challenged regulations authorize banks to engage in unlawful competition, permitting them to enter the mutual fund business and engage in *issuing, selling, distributing* and *underwriting securities* in violation of Section 16, 20, 21 and 32 of the Glass-Steagall Act. Appellees are not merely challenging a program of governmental assistance, financial or otherwise, to lawful competitors *whose competitive activities* have been specifically authorized by Congress.

Brief for Appellees 66 (emphasis added).

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[5] Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:

> [W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption . . . .

Kansas City Power & Light Co. v. *McKay*, 96 U.S. App. D.C. 273, 282, 225 F.2d 924, 933, *cert. denied*, 350 U.S. 884 (1955). Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of "legal wrong" of "adversely affected or aggrieved . . . within the meaning of any relevant statute." *See Pennsylvania R.R. Co.* v. *Dillon, supra*, n. 2.

Appellees then go on with sweeping contentions "that competitors have the right to challenge new competition, authorized by administrative action, which has been prohibited by statute."

* * *

> Furthermore, there is *no justification* for the gloss which Appellants attempt to put on *Hardin requiring a specific and express Congressional intent to protect particular plaintiffs in order to confer standing on them* to challenge regulations which create unlawful competition. The well-established rule, in this Court, the Supreme Court, and other courts, is directly to the contrary. *Where the effect of the statutory prohibition is to bar competition*, those subject to such illegal competition created by administrative regulation have the standing to challenge the regulation.

Brief for Appellees 66, 67, 73 (emphasis added).

Appellees have thus sought to shift the focus to the activity of the Bank and its alleged violation of the strictures of the Glass-Steagall Act; their burden is to establish their own status as intended statutory beneficiaries of a freedom from competition by national banks.

In a recent decision denying standing in a suit brought by the Association of Data Processing Service Organizations and Data Systems, Inc.[6] challenging allegedly improper national bank entrance into the data processing business, the Eighth Circuit made some cogent observations:

> Much of the confusion on standing seems to arise from the emphasis upon the issues to be adjudicated or

[6] Data Systems Inc. is a Minnesota corporation engaged in the data processing business. Association of Data Processing Organizations is an incorporated association domiciled in Pennsylvania whose members perform data processing services throughout the United States.

> upon the possible merits of the substantive claim rather than upon an examination of the status of the complaining plaintiff. *Whether or not a defendant is alleged to be engaged in illegal competition cannot by itself* determine a plaintiff's standing to complain. ... The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.
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> • • •
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> [I]t seems clear that an allegation of "illegal competition" is not the balancing determinant of a plaintiff's standing. The primary search must rest on whether the plaintiff's status is one which enjoys a private interest entitled to protection or one which the law recognizes to be of such legal significance to allow a party to act as a public representative for a public interest.

Association of Data Processing Service Organizations, Inc. v. *Camp*, No. 19,218 (8th Cir., Feb. 6, 1969) (citations omitted) (emphasis added).

That Court found that the plaintiffs were "competing in a non-regulatory field of free competition," they were not members of any class "designedly protected by statute," and they possessed no legal interest "recognized at law." *Id.* at 10. Accordingly, they had no standing to challenge the new rulings by the Comptroller which allowed the bank to offer these new services.

As previously indicated, the Glass-Steagall Act does not contain the familiar provisions which constitute an aid to standing in terms of allowing a "person aggrieved" to challenge administrative decisions or promulgations made pursuant to the Act. Nor can Appellees validly assert any "license, grant, or recognized property interest" entitling them to standing. It is equally clear that giving even the broadest reading of the legislative history embellishing the

Act will not support the conclusion that Congress meant to bestow upon Appellees any protection from competitive injury.[7] With these bases of standing foreclosed, Appellees necessarily turn to the inaccurate definition of "unlawful competition" which I find to be without support in an analysis of the "competition" cases.

For the most part the cases relied on by Appellees are readily distinguishable. In *American Trucking Assn,* 364 U.S. 1 (1960), the Court found a statutory purpose to protect "all modes of transportation" and the complaining party had the benefit of a specific "party in interest" aid to standing. Interstate Commerce Act, 49 U.S.C. § 305 (g). *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958), involved a plaintiff which held a license, thereby entitling it to oppose another carrier's operation without obtaining a license. In *Frost, supra,* the Court found that a cotton gin licensee had a "property right" and could challenge the invasion of this right by another without a valid license. In *Whitney Nat'l. Bank, supra,* the Court allowed a state

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[7] *See* Judge Bazelon's opinion at p. 25. The thrust of the legislation, and the concern of the drafters, was to protect the banking public through the maintenance of a sound national banking system. Senator Bulkley, one of the managers of the bill, made it explicit in his remarks that the bill was not focused on protecting the investing public, much less the securities industry:

> [T]he purpose of this bill does not extend to safeguarding purchasers of securities as such. The purpose of this bill is to improve the operation of the Federal Reserve System and the banks which are members of it. The object of the inhibitions which I am discussing here is not primarily to protect the investing public, although that is a worthy purpose, but our field is to protect the operations of the banking system itself, and to protect the depositors and customers of the banks so that they shall have the service from national and State member banks which they are entitled to expect.

75 CONG. REC. 9913-14 (1932). *See also* Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 266 (1961).

bank to challenge the Comptroller's authorization of new branch banks from national bank competition. The *Georgia Insurance Ass'n* case, *supra*, involved a provision of the Glass-Steagall Act which evidenced an affirmative legislative intent to protect local insurance agents from the competition of national banks.

Some of the language in *Port of New York Authority*, *supra*, is more troublesome. There, a group of investment bankers challenged the Comptroller's authority under Glass-Steagall to permit national banks to distribute revenue bonds not backed by the taxing power of the public body issuing the bonds. In acknowledging standing for the investment bankers to pursue their challenge, the District Court explained:

> While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against *illegal competition*, or *specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities*. In this respect this action is precisely parallel to cases in which a state bank has been permitted to maintain suit to restrain the Comptroller of the Currency from granting permission to a national bank to establish a branch that would compete with the plaintiff.

Id. at 248 (emphasis added).

It seems to me that the District Court gave undue weight to the claim of unlawful competition and in effect equated it with competition created by illegal *activities*. This made it possible to rely on the "branch banking cases" which are not really applicable, since those cases turn on the provisions of Glass-Steagall which limit branch banking of national banks specifically in order to protect state banks from the unrestricted competition of national banks. *See*,

Pennsylvania R.R. Co. v. *Dillon,* 118 U.S. App. D.C. 257, 335 F.2d 292, *cert. denied sub nom. American Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945 (1964); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.,* 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), *rev'd on other grounds,* 379 U.S. 411 (1965).[8]

Appellees here pursue their associational livelihood in a securities marketing industry which thrives on competition in the quest for the investment dollar. The entry of the national bank commingled investment accounts into this competition admittedly adds a whole new category of competitors but it is fundamentally not different from the situation which arises, for example, when "gas stations" sell candy bars, soft drinks and other staples for which travellers have need. Nevertheless, before Appellees may sue to prevent bank competition which affects their private financial interests, they must establish that the Glass-Steagall Act contemplated that they were to be protected from this competition in their pursuits. Even assuming that the competing activity of the Appellant Bank may be otherwise violative of a provision of the Act, I can find no indication that the Act intended to afford protection to securities dealers generally. My position therefore is one of reservation amounting to virtual disbelief in any standing in Appellees.

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[8] In *Pennsylvania R.R. Co.* v. *Dillon,* we specifically noted this critical distinction:

> Appellants' reliance on *Whitney* [citation omitted] is also misplaced. There, this court held that certain state banks had standing to attempt to enjoin the Comptroller of the Currency from issuing to a national bank a Certificate of Authority allegedly in violation of federal banking statutes. The court found that federal statutes had guaranteed that state banks would be free of certain competition from national banks.

118 U.S. App. D.C. at 262 n. 6, 335 F.2d at 297 n. 6.

(3)

Persuasive arguments can be advanced that the pressure for someone with standing to challenge conduct in matters of large public interest is so great that irreconcilable abstractions and distortions have emerged to satisfy what are thought to be the needs. Quite often courts pursued a "bootstrap" or circular logic by initially analyzing the merits, in order that a finding of standing to challenge actions seems more palatable because the course has already found a possible encroachment of "rights" which it desires to review. To evaluate standing solely or even primarily on such visceral reactions does violence to the judicially created concepts of standing:

> The fundamental aspect of standing is that it focuses *on the party* seeking to get his complaint before a federal court *and not on the issues* he wishes to have adjudicated.

Flast, supra at 99 (emphasis added).[9]

Evaluating Appellees' qualifications as prospective litigants on behalf of their own private economic interests and the public's interests, it becomes evident that they are indeed adverse both as respects their actual prosecution of this litigation and in regard to their fundamental challenge to the Comptroller's authority to allow the national banks to engage in this type of securities activity. Their financial interest in these proceedings has been examined in the preceding opinion, and when this is coupled with authorita-

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[9] The *Flast* Court spoke in terms of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." However, I suggest that the thrust of the "constitutional" reference was in relation to the ability to challenge the particular action—federal expenditures in sensitive constitutional areas—there involved and was not intended to retard the flexibility of sound concepts of standing when the plaintiff's assertions focus on non-constitutional violations in areas of administrative activity.

tive prognostications of impending financial harm to their interests if the Comptroller's regulations are allowed to stand,[10] it is obvious that there exists one cogent qualification of a challenger in the reasonable probability of factual aggrievement sufficient to insure the spirited adverseness necessary to judicial resolutions.

With this element satisfied, on this record the alternative to a grant of Appellees' claim to standing would be to effectively frustrate any challenge to the regulations in question.

(4)

Because of the factors discussed heretofore I am unable to set aside my grave doubts as to Appellees' standing to institute and maintain these suits. However, in the uncertain state of the law as to standing, there is something to be said on both sides of that question. I therefore resolve my doubts in favor of the Appellees and concur in the result of that portion of the foregoing opinion which holds that the Appellees have standing. I am influenced substantially, as I indicated at the outset, by the need for judicial examination of the important questions raised.

The record before us reflects that the Federal Reserve Board and other government agencies involved gave careful and comprehensive study to all aspects of this problem before taking the actions challenged by the mutual fund industry. Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special

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[10] Indeed, the Comptroller himself predicted that in the next decade commercial banks operating under these regulations "might capture as much as two billion dollars of mutual fund business." *Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88 Cong., 2d Sess. p. 26 (1964).

regulatory bodies established by Congress for that purpose. On the face of the record there is, of course, nothing very startling about the decisions of the Comptroller, the Commission or of the Federal Reserve Board. In one form or another banks have been holding, managing and investing funds for customers for a long time. Indeed, when one considers the historical background it could be reasonably argued by banks that "investment trusts" and more recently "mutual funds" have invaded their domain. However, such arguments are of a kind which are for the regulatory agencies.

Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

APPENDIX B

[Caption omitted]

Opinion of the United States District Court, District of Columbia

McGARRAGHY, District Judge.

This action is brought against the Comptroller of the Currency by the Investment Company Institute in its representative capacity of the open-end investment companies, investment advisers and principal underwriters which comprise its membership. The Investment Company Institute (hereinafter called the Institute) is an unincorporated association, having its principal place of business in the city, county and state of New York. The Institute is a national asociation, having as its members 177 open-end management investment companies and their 88 investment advisers and 78 principal underwriters. The open-end management investment companies which are members of the Institute have assets of $36 billion, representing about 94 percent of the assets of all such companies in the United States, and have approximately 3.5 million shareholders. The other plaintiffs in this action are several individual members of the Institute. They seek an injunction to restrain the Comptroller from authorizing national banks to collectively invest funds tendered to the bank as managing agent solely for investment purposes. They also pray for a declaratory judgment adjudicating the pertinent regulation promulgated by the Comptroller to be invalid.

The action is now before this court on cross motions for summary judgment, all of the parties agreeing that no factual issues exist and that the legal issues are ripe for disposition by summary proceedings.

It is first necessary to review and to delineate the factual background upon which the issues in this action arose and within which these motions are made. In September of 1962 the statutory authority to regulate the fiduciary activities of national banks was transferred from the Board

of Governors of the Federal Reserve System to the Comptroller of the Currency. Pub.L. 87-722, 76 Stat. 668, 12 U.S.C. § 92a. Pursuant to this authority, the Comptroller caused to be published in the Federal Register for February 5, 1963, a proposed revision of the fiduciary regulation, 12 C.F.R. § 9. In addition to the types of collective investment funds permitted under the prior regulation, this proposed revision provided that national banks were authorized to invest funds held in the capacity of managing agent in a collective investment account, 12 C.F.R. § 9.18(a) (3).[1] Moreover, the proposed revised regulation allowed the Comptroller to approve collective investment of such funds in manners other than those expressly provided by regulation 9, 12 C.F.R. § 9.18 (c) (5).[2]

The Comptroller invited national banks and other interested parties to submit comments pertaining to the proposed regulation. Plaintiff Institute, on behalf of its members, participated to the full degree permitted and submitted a statement in opposition to the proposed regulation. It premised its argument on the same basis that it is presenting before this court, namely, that the revised regulation would allegedly permit activity prohibited by 12 U.S.C. § 92a, and certain provisions of the Glass-Steagall Act, as amended, 12 U.S.C. §§ 24, 78, 377 and 378. Notwithstanding this opposition the final regulation was adopted by the Comptroller on April 5, 1963, and revised by minor modifications on February 5, 1964, 12 C.F.R. § 9.18.

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[1] (3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust.

[2] (5) In such other manner as shall be approved in writing by the Comptroller of the Currency.

Pursuant to the regulation, on May 10, 1965, the Comptroller approved a plan submitted by First National City Bank of New York (hereinafter referred to as the Bank) for the establishment and operation of a collective investment fund, called the Commingled Investment Account, under Regulation 9, 12 C.F.R. § 9. The plan as outlined by the Bank differed from the specifically enumerated collective investment funds authorized by the Comptroller's revised Regulation, but the Bank, pursuant to 12 C.F.R. § 9.18(c) (5) sought and obtained the Comptroller's written approval of the plan.

On April 20, 1966, the Bank registered its Commingled Investment Account with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* as an open-end management investment company. On the same date, the Bank filed a registration statement with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, for the purpose of registering the participating interests or units to be issued by its Commingled Investment Account. The registration statement concerning those participating interests or units became effective on June 14, 1966. From that date the Bank has offered and sold to the public participating interests or units issued by the Commingled Investment Account by means of the prospectus for the First National City's Commingled Investment Account.

Before proceeding to the merits of this controversy, it is best at this time to specifically describe the operation of a mutual fund and the operation of the Commingled Investment Account (hereinafter referred to as the Account) so that a better understanding of the problem can be achieved.

Generally, "mutual funds" are open-end management companies engaged in the business of continuously issuing and offering for sale redeemable securities which repre-

sent an undivided interest in the fund's assets. Most mutual funds are corporate in form and the securities issued by them usually consist of capital stock. However, there are a number of mutal funds in a variety of non-corporate forms and the securities issued by some of them are variously denominated as beneficial interests, participating agreements, and the like. The proceeds from the sale of the securities issued by a mutual fund are invested in a portfolio of securities of various kinds, in accordance with the stated investment policy of the particular fund. Some funds invest primarily in securities offering current income; others concentrate on long-term growth securities; still others specialize in particular industries or classes of securities; and many offer various combinations of objectives. The shareholder in a mutual fund is entitled at any time to redeem his interest, usually at net asset value, or in a few instances upon payment of a charge. To facilitate this redemption privilege as well as to establish a price at which new shares are being offered, the value of a share in a mutual fund is calculated regularly, typically twice daily, on the basis of the market value of the securities held by the fund. Because of the continuous process of redemption, the mutual fund would be restricted and contracted in size, unless it continuously issued and offered new securities for sale.

Except in unique circumstances, virtually no shares in mutual funds are traded from one investor to another, and there is no significant trading market for such shares. In almost all cases, shareholders in mutual funds desiring to obtain cash for their shares redeem them with the issuing company. The securities issued by most mutual funds are offered to the public at a price which includes a sales commission or sales load. There are some mutual funds whose shares are sold with no sales commission being charged. These latter funds are frequently called "no load" mutual funds. The activities of mutual funds are under the control of a board of directors or board of trustees. Directors

or trustees are elected annually by the vote of a majority of the fund's outstanding voting securities.

Mutual funds usually contract an outside investment adviser for investment advice and other management services, and with a principal underwriter for the distribution of the fund's shares, pursuant to the statutory pattern established by the Investment Company Act of 1940, 15 U.S.C. § 80a-15. The investment adviser of a mutual fund furnishes advice to the fund with respect to its investment portfolio and the securities it should buy, hold, and sell. In some cases the adviser is empowered to purchase and sell securities for the fund. Some investment advisers also furnish supervisory and administrative services to the mutual fund. The investment adviser receives compensation for its services, usually in the form of a fee based on the total value of the assets being managed.

The principal underwriter of a mutual fund is engaged in the business of selling and distributing the securities issued by the fund to the investing public through brokers or dealers, or directly through the underwriter's own salesmen, or both. The principal underwriter either purchases the securities issued by the fund for resale or acts as agent for the fund in distributing the securities. Except in the case of a no-load fund, the principal underwriter receives a fee for its services, usually in the form of a portion of the sales commission included in the selling price of the shares issued by the mutual fund.

Mutual funds are required to be registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940. The activities of the mutual funds and their relationship with affiliated persons and others are all subject to regulation under the Act. The investment advisers and principal underwriters who are plaintiffs herein, perform their services for the mutual funds they serve pursuant to contracts, the terms, execution and continuation of which are subject to the provisions of

Section 15 of the Investment Company Act of 1940, 15 U.S.C. § 80a-15. The securities issued by each of the mutual fund members of the Institute are registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* All such securities are offered to the investing public by means of a prospectus which is initially filed with the Securities and Exchange Commission under the Securities Act of 1933 as part of the registration statement for the securities to which the prospectus relates.

As can be readily ascertained, the mutual fund community is composed of three principal members. First the body corporate of the fund itself whose membership is the general investing public. This relationship is analogous to the common productive corporate structure. However, the primary function of the investment corporation is to obtain the objectives which are outlined in their charter through the mutual investment of the funds contributed by the "shareholders." *Aldred Inv. Inst.* v. *S. E. C.*, 151 F.2d 254 (1st Cir. 1945), *cert. denied*, 326 U.S. 795, 66 S.Ct. 486, 90 L.Ed. 483 (1945). The relationship between the shareholder and the body corporate is plainly one of contract. *Stevenot* v. *Norberg*, 210 F.2d 615 (9th Cir. 1954); *see also Schroeter* v. *Bartlett Syndicate Bldg. Corp.*, 8 Cal. 2d 12, 63 P.2d 824, 825; *Ellingwood* v. *Wolf's Head Oil Refining Co.*, 27 Del.Ch. 356, 38 A.2d 743, 154 A.L.R. 406 (1944); Corporations, 18 Am. Jur.2d § 463 (1965).

The management function of the mutual fund lies with the board of directors. They have essentially the equivalent powers as any corporate board of directors. In the same manner they are also responsible to their shareholders as fiduciaries. *Pepper* v. *Litton*, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Brown* v. *Bullock*, 194 F. Supp. 207 (S.D.N.Y. 1961, *affirmed*, 294 F.2d 415 (2nd Cir. 1961).

The board of directors within its broad scope of authority has the power to enter into contracts with the other

two members of the mutual fund community, that is the investment advisers and the underwriters. The functions performed by the latter two members of the mutual fund community is essential for the propagation of the investment or the mutual fund corporation. The interrelationship of these independent entities is one of contract which essentially determines the respective position occupied within the structure by each member. The independence of each member is governed by statute as is their interdependence; see the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.*

The above few paragraphs outline the general operation of the mutual fund structure. A similar outline is now presented for the operation of the Account as created by the Bank and approved by the Comptroller pursuant to Regulation 9.

The Account as established by the Bank, operates as follows: the investor-customer tenders his funds, $10,000 or more, to the Bank pursuant to a broad authorization making the Bank the customer's managing agent. There is thus created a principal-agent relationship between each individual investor-customer and the Bank. The authorization includes specific authority for the Bank to invest the customer's funds, together with the funds of other customers who have given the equivalent authorization, through the commingled Account. Funds in the commingled Account are invested in a pool of securities, principally common stocks and securities convertible into common stocks, offering the opportunity for long-term growth of capital and income. The Account is divided into "units of participation" of equal value in order to determine conveniently the proportionate interest of each participant. No certificates indicating the "units of participation" are issued by the Bank; however, the participant is informed by a non-negotiable document as to how many "units of participation" are contained in his account.

A participation is transferable only to another person who has validly appointed the Bank as managing agent, and, because of the underlying agency relationship, the interest of a participant terminates upon his death or incompetency and his funds are withdrawn from the Account and held for his legal representatives. There is no sales charge imposed on amounts invested in the commingled Account nor is there any redemption charge incurred upon withdrawal from the Account. An investor-customer may terminate his participation in whole or in part on the basis of the net asset value of the units of participation being redeemed. The net asset value of each unit of participation is determined as of the close of business of each of a number of specified valuation dates by dividing the net asset value of the Account as of the close of business on the valuation date by the number of units of participation then outstanding.

The operation of the Account is supervised by a Committee of five persons, who act essentially as a board of directors of the Account. Initially the members were appointed by the Bank, but hereafter are to be elected annually by the participants. Each participant will be entitled to vote at the election of the Committee members and his vote will be weighted according to the number of "units of participation" in his account. At least 40% of the members of the Committee must at all times be persons not affiliated with the Bank, but the majority of the members may be, and are expected to be, officers in the Bank's Trust and Investment Division.

The Committee is authorized to enter into a management agreement with the Bank. The agreement and any amendments thereto must be approved by more than 50% of the participants at their annual meeting and the Comptroller's approval thereof must also be obtained.

In accordance with the management agreement, the Bank serves as investment adviser and custodian for the Ac-

count. The Bank, therefore, maintains a continuous investment program consistent with the commingled Account's stated investment policy; it will determine what securities are to be purchased and sold, and will execute all transactions. The management agreement provides that the Bank will furnish all administrative, custodial and clerical services required by the Account and will pay all the organization costs and expenses. Subsequent mainteance fees, the cost of independent professional services, such as legal, auditing and accounting services, and the cost of preparation and distribution of notices to participants and proxy statements are to be borne by the commingled Account. The Bank will, however, reimburse the Account for the compensation and expenses, if any, paid by the Account to the members of the Committee who are not affiliated with the Bank; the other members of the Committee will receive no separate compensation for their services to the Account. For these services the Bank receives a fee equal to ⅛th of 1 percent of the average of the net asset value of the Account taken on each valuation date during each fiscal quarter, which is approximately ½ of 1 percent on an annual basis.

Essentially, the commingled management agency Account as delineated by the Bank's plan consists of two principal members, the first being the membership of the Account consisting of the investor-customer, and the second being the Bank which occupies a dual position, one as investment adviser to the Account and the other as general agent to the participants of the Account. The Bank can also be considered to occupy the position of underwriter for the units of participation which are issued to the investor-customer. The Committee of the Account occupies a position equivalent to that occupied by the board of directors of the mutual funds.

The Account has been approved by the Comptroller, even though it does not essentially comply with all provisions of Regulation 9 as promulgated by him. This action indi-

cates that even though the Account as presently structured does not meet every minute detail of the Regulation, any future plans similar to the one established by the Bank will obtain his approval under 12 C.F.R. § 9.18(c)(5). Therefore, it is not necessary for this court to analyze the differences between the Account as established by the Bank and Regulation 9. For the disposition of the issues before this court, the Account will be treated as if it completely meets the substantive requirements of Regulation 9. 12 C.F.R. § 9.

Before the merits of the issues in this case can be reached two preliminary procedural matters must be noted. The Comptroller interposes the objection that the plaintiffs lack standing to sue, and that there is no justiciable issue before this court.

These issues—standing and justiciability—are nominally termed procedural only to differentiate between the initial hurdles which a plaintiff must overcome in order to obtain a judicial determination of his action on the merits, and the actual adjudication of the case on its substantive issues. This characterization often borders on mere semantics, since in order to obtain the proper perspective and focus upon the essence of these issues, as here, the substantive law upon which the plaintiffs premise their action must also be taken into account.

Standing has been, and remains, one of the most enigmatic areas of the law. 3 Davis, Administrative Law Treatise, § 22.18, at 291-92, n. 3. The courts have not developed a single formula which can be applied to a set of facts to determine whether a plaintiff has or does not have standing. The ever changing concepts which have been used in this area of the law can be readily ascertained by the many cases which have been cited in the briefs of both parties upholding their contentions. Due to the pervasiveness of definition in this area, the court is left with no alternative but to examine the long list of cases which

hold that a particular plaintiff has standing on one hand, and on the other the long list of cases where the plaintiff has been denied his day in court because of the lack of standing.

Standing has been generally expressed by an indication that the alleged aggrieved party has asserted a legal right which was his to assert, or has been injured, or has been threatened with injury. Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940), cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940), Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). But standing should not be confused with the doctrine of standing to sue which provides that in an action in a federal constitutional court, by a citizen against a government officer in his official capacity, there is no justiciable controversy unless the citizen shows that such conduct invaded or will invade a private substantive legally protected interest. Associated Industries of New York v. Ickes, 134 F.2d 694, 702 (2nd Cir. 1943) vacated as moot, 320 U.S. 707, 64 S.Ct. 74, 88 L.Ed. 414 (1943), but see Scott v. Macy, 121 U.S.App. D.C. 205, 349 F.2d 182 (D.C. Cir. 1965). The former standing is basically a means by which courts can accept or refuse jurisdiction, and it generally alludes to the capacity of a party to obtain judicial review of an administrative action. See United States v. Storer Broadcasting Co., 351 U.S. 192, 197, 76 S.Ct. 763, 100 L.Ed. 1081 (1956) and Jaffe, Primary Jurisdiction, 77 Harv.L.Rev. 1037 (1964). The doctrine of standing to sue is generally directed towards the capacity of a plaintiff to present his case before a district court *ab initio*.

The question as to whether a plaintiff may obtain judicial relief in cases like this has been variously phrased, but the many appellations which have been devised do not detract from the underlying policy objective which permeates each of these cases. This policy is well enshrined

in Article III, § 2 of the United States Constitution, that is, a "constitutional" federal court cannot be given power to sit in judgment and revise administrative action, since there is no justiciable controversy and the opinion thus issued would merely be advisory. See concurring opinion of Mr. Justice Frankfurter in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 150, 71 S.Ct. 624, 95 L.Ed. 817 (1951), Muskrat v. United States, 219 U.S. 346, 354, 31 S.Ct. 250, 55 L.Ed. 246 (1911), Chicago & Southern Airlines, Inc. v. Waterman Corp., 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948), United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947), Associated Ind. of New York v. Ickes, supra.

Standing to challenge an administrative action can be premised on a statutory provision specifically appended to the statute under which the administrative action was promulgated or where the provision for review has been made generally applicable by the Administrative Procedure Act, 5 U.S.C. §§ 701-704 (recodified by Pub. Law 89-554, 80 Stat. 378). Since there is no specific provision for review of the Comptroller's regulation within the terms of the enabling statute, Title 12, Section 1 et seq., the terms of the Administrative Procedure Act will apply. Citizens Nat. Bank of Maplewood v. Saxon, 249 F.Supp. 557 (D.C. Mo. 1965), affirmed Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966). See also United Gas Pipe Line Co. v. F. P. C., 86 U.S. App. 314, 181 F.2d 796 (1950), cert. denied 340 U.S. 827, 71 S.Ct. 63, 95 L.Ed. 609 (1950).

The pertinent section of the Administrative Procedure Act specifically provides that:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

Under this statutory provision a plaintiff must allege that he has suffered a legal wrong or that a legally protected right will be adversely affected or aggrieved by the agency's action in order to obtain standing before this court. The plaintiffs here are alleging that they are suffering a legal wrong by the allegedly illegal competition made possible by the Comptroller's regulation, thereby being adversely affected or aggrieved. The exact amount of damages which will be incurred by the plaintiffs is rather difficult to assess in precise figures, but the Comptroller has predicted that over the next five to ten years, commercial banks might capture as much as two billion dollars of mutual fund business.[3] The defendant interposes that the competition, even if illegally promulgated, does not create any legal wrong for which the plaintiffs may complain.

In support of its contention that the plaintiffs are not suffering any legal wrong and thereby lack standing to challenge the Comptroller's regulation, the defendant relies on a series of cases which contain the general principle that mere competitive injury made possible by governmental action does not confer standing on the injured party to restrain governmental action. Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137, 59 S.Ct. 366, 83 L.Ed. 543 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464, 479, 58 S.Ct. 300, 82 L.Ed. 374 (1937); Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940); Texas State AFL-CIO v. Kennedy, 117 U.S. App. D.C. 343, 330 F.2d 217, 218 (1964); Benson v. Schofield, 98 U.S. App. D.C. 424, 236 F.2d 719 (1956), cert. denied 352 U.S. 976, 77 S.Ct. 363, 1 L.Ed. 2d 324 (year); Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 225

[3] Hearings on H.R. 8499, 9410 before the Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce, 88 Cong.2d Sess. p. 26 (1964). See also Comment, Of Banks and Mutual Funds: The Collective Investment Trust, 20 Sw.L.J. 334 (1966).

F.2d 924 (1955), cert. denied 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed. 780 (1955). In these cases, the plaintiffs alleged that they were suffering economic loss from the government created competition, but it is significant to note that the competition created by government action in these cases was specifically authorized and sanctioned by Congress and was based upon specific statutory grounds.

Moreover, most of the cases cited by the defendant in support of his allegation that the plaintiffs lack standing have been assiduously distinguished by subsequent decisions of the Supreme Court, even though they have not been expressly overruled. In City of Chicago v. Atchison, Topeka & Santa Fe Railway, 357 U.S. 77, 78 S.Ct. 1063, 2 L.Ed. 2d 1174 (1958), the Supreme Court gave explicit recognition to a competitor's standing to challenge illegal competition. That case involved two competitors, one of whom (Parmelee) had alleged that the other (Transfer) was operating illegally because it had not complied with certain licensing requirements imposed by the City of Chicago. Transfer argued that Parmelee had no standing to object to Transfer's allegedly illegal competition, but this argument was flatly rejected by the Court:

> "It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation, Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition.
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> * * * * * *
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> "[Transfer] argues that a party has no right to complain about lawful competition, citing Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374, and Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543. We do not regard either of these cases as controlling here. It seems to us that Transfer's argument

confuses the merits of the controversy with the standing of Parmelee to litigate them. * * * Parmelee's standing could hardly depend on whether or not it is eventually held that Transfer can lawfully operate without a certificate of convenience and necessity." 357 U.S. 77, at 83-84, 78 S.Ct. 1063, at 1067.

With regard to some later cases holding that competitors had standing, see American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed. 2d 1527 (1960), National Motor Freight Traffic Ass'n v. United States, 371 U.S. 223, 83 S.Ct. 311, 9 L.Ed. 2d 273, rehearing denied 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed. 2d 709 (1963), affirming 205 F.Supp. 592 (D.C. D.C. 1962) only on the merits but not as to the standing issue; Philco Corp. v. FCC, 103 (U.S. App. D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed. 2d 352 (1959); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S. App. D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965).

In two recent cases challenging the authority of the Comptroller to promulgate regulations under other sections of the banking statutes, the plaintiffs have been granted standing to challenge the regulations over the objections of the Comptroller. Since these cases are directly in point they will be discussed at length. In Baker, Watts & Co. v. Saxon, 261 F.Supp. 247 (D.C. D.C. 1966), a number of plaintiffs, engaged in underwriting and distributing revenue bonds, sought a declaratory judgment that the Comptroller's regulations authorizing commercial banks, for the first time, to enter the revenue bond business violated the Glass-Steagall Act. The Comptroller raised the standing defense, citing the identical cases as brought forth in his present argument. Judge Holtzoff summarily disposed of that contention by stating:

"The gravamen of the plaintiffs' claim for relief is that they are being subjected to competition by illegal

activities of national banks. While no one may maintain a suit to restrain lawful competition merely because he is suffering an economic detriment, nevertheless, a person has a standing to complain against illegal competition, or specifically, against competition on the part of a person who lacks the legal right or power to pursue the competitive activities." 261 F.Supp. at 248.

Judge Holtzoff's opinion focuses not on the impairment of the plaintiffs' competitive position by the unlawfully created competition, but rather on the premise that but for the illegal competition condoned by the Comptroller's regulation, the plaintiffs would not have any economic detriment to base their complaint.

Likewise, in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, 260 F.Supp. 802 (N.D. Ga. 1966), the district court denied a motion to dismiss for lack of standing. In that case the Comptroller had authorized, for the first time, national banks to sell insurance in towns with more than 5000 people, even though Section 92 of Title 12 of the United States Code permitted banks to act as insurance agents only in places with a population of 5000 or less. Plaintiffs were insurance agents and trade organizations representing insurance agents. Plaintiffs there alleged that the Comptroller was acting beyond his authority to issue the ruling which was in direct violation of 12 U.S.C. § 92 and that, as a result, national banks were able to illegally compete with the plaintiffs. The district court, in reaching its conclusion, observed that:

"In Tennessee Electric Power Co., supra, and in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1937), the plaintiffs alleged that they were suffering economic loss from the government-created competition. In both cases the Supreme Court held that such economic loss alone did not confer standing on the aspiring plaintiffs. It is important

to note that such competition was authorized by Congress and was based upon statutory grounds.

"In the instant case, the competition complained of is not explicitly authorized by statute, but rather is impliedly prohibited by the congressional grant of the power * * *." 260 F.Supp. at 803.

The district judge, in denying the Comptroller's motion to dismiss, further stated:

"The Court is of the opinion that the defendant's attack on the plaintiffs' standing is without merit. Title 12 U.S.C.A. § 92 has the effect of protecting insurance agents from certain competition. Surely, the plaintiffs have the right to their day in court to show that the protection afforded them by 12 U.S.C.A. § 92 has been violated." 260 F.Supp. at 804.

Subsequent to its finding of standing, the District Court ruled on the merits of the issues and granted the declaratory judgment and injunction which was sought by the plaintiffs. 268 F.Supp. 236 (N.D. Ga. 1967).

Defendant places great reliance in his brief on the recent case of Pennsylvania Railroad Co. v. Dillon, 118 U.S. App. D.C. 257, 335 F.2d 292 (1964), cert. denied sub nom. American Hawaiian Steamship Co. v. Dillon, 379 U.S. 945, 85 S.Ct. 437, 13 L.Ed. 2d 543 (1964).

In that case plaintiffs alleged not only that defendant Dillon had exceeded his statutory authority but also that the competitive activity which had been allowed was in and of itself illegal. The competing carriers challenged the authority of the Secretary of the Treasury to enroll certain vessels in the coastwise trade, allegedly in violation of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883. That section prohibited the enrollment and documentation of vessels "jumboized" by installation of foreign-made mid-bodies. The Court of Appeals for the District of

Columbia Circuit found that the carriers lacked standing even though they alleged the competition was illegal and in violation of the specific provision of the statute. The Court pointed out the dichotomy of Section 10(a) of the A.P.A., namely the "legal wrong" aspect and the "adversely affected or aggrieved" aspect, as it related to the issue of standing and it concluded that:

> "Under either leg of Section 10(a), therefore, since appellants only complain of government enhancement of economic competition, they must demonstrate 'statutory aid to standing'." 335 F.2d at 295.

After analyzing the enabling statute the Court concluded that "Congress did not intend to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition." 335 F.2d at 295.

A close analysis of the holding in the *Pennsylvania Railroad*, supra, case does not require a determination of the standing issue adverse to the plaintiffs. In that case the Court of Appeals found that the underlying purpose of the statute under which the regulation was promulgated was to stimulate and encourage resort to domestic shipyards and thus to ensure them sufficient business so that their facilities would be adequate at times of national emergencies. 335 F.2d 292, at 295. The statutes, under which the regulation in issue was promulgated, were enacted to establish a clear Congressional policy which sought to separate national commercial banking from the securities business.[4] The primary intent of Congress was to

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[4] Hearings Pursuant to S.Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3rd Sess. (1931).

S.Rep. No. 77, 73d Cong. 1st Sess. (1933). H.R.Rep. No. 742, 74th Cong. 1st Sess. (1935).

See also 75 Cong.Rec. 9909 (1932) (remarks of Senator Bulkley).

segregate these functions and to allow separate entities to engage in these business areas. This clarity of purpose is garnered not only from the Congressional hearings reports of the Glass-Steagall Act, but also from the exactitude with which Congress has delineated the areas of common interest in this financial structure.[5] This strong general policy against the invasion of either field of endeavor by either entity is sufficient to postulate an interest upon which standing to challenge the regulation may be premised, cf. American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1, 80 S.Ct. 1570, 4 L.Ed.2d 1527 (1960).

Therefore, by implication, the plaintiffs here have a right to complain of the competition which is being condoned under the Regulation. This competition is illegal in the sense that Congress has indicated its policy of separating the two financial institutions and this Regulation allows in an indirect manner a joinder of these interests. The plaintiffs were the recipients by implication of Congressional protection.

Even if this invasion would not in fact cause a palpable injury[6] to be inflicted upon the plaintiffs which could be termed to be a legal wrong under the first leg of Section 10(a) of the A.P.A., now 5 U.S.C. § 702, the plaintiffs could have standing to represent the public interest as held in Sanders Bros. Radio Station v. F.C.C., 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940). Scripps-Howard Radio, Inc. v. F.P.C., 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942), and F.C.C. v. N.B.C. (K.O.A.), 319 U.S. 239, 63 S.Ct. 1035, 87 L.Ed. 1374 (1943). See the application of this doctrine by Judge Frank in Associated Industries of New York v.

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[5] Note specifically amendments made to Section 24, par. Seventh of Title 12.

[6] Bantam Book v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963)—see also the discussion of the "Adversely Affected in Fact" doctrine promulgated by Prof. Davis, 3 Davis, Administrative Law Treatise § 22.02 (1965 Supp.).

Ickes, 134 F.2d 694 (2nd Cir. 1943), vacated as moot 320 U.S. 707, 64 S.Ct. 74 (1943).

The practical effect of the doctrine advanced by those series of cases grants standing to challenge the legality of administrative action to one who is in fact adversely affected by administrative action. Standing in those instances is predicated upon the theory that the plaintiffs do not represent their own private property interests but rather the interests of the public. In the instant situation the plaintiffs could be classified as private "Attorneys General" based on the premise that the public policy dictated by Congress in the Glass-Steagall Act is not being adhered to by the agency charged with its enforcement. See Philco Corp. v. F.C.C., 103 U.S.App.D.C. 278, 257 F.2d 656 (1958), cert. denied 358 U.S. 946, 79 S.Ct. 350, 3 L.Ed.2d 352 (1959), where the competitive interest of a manufacturer and not a broadcaster was held sufficient to satisfy the "person aggrieved" provision of the Federal Communications Act. See also Jaffe, Standing to Secure Judicial Review: Public Actions and Private Actions, 74 Harv. L.Rev. 1265 (1961), 75 Harv.L.Rev. 255 (1961), and Davis, 3 Administrative Law Treatise §§ 22.04, 22.05, 22.11 (1958), (Supp.1965).

Finally, a denial of standing, as urged by the defendant, would leave the plaintiffs and all others similarly situated without a right to seek redress against capricious, arbitrary and unwarranted Regulations issued by the Comptroller, however flagrant and contrary to the intent of Congress. This court, therefore, holds that the plaintiffs have standing to challenge the Comptroller's Regulation 9.

The Comptroller also asserts that there is no justiciable issue or controversy present in this case. This assertion is bifurcated on two grounds. The first is apparently premised upon the theory that the Comptroller's regulation permitting national commercial banks to establish the commingled Account does not regulate nor does it impose any obliga-

tion or duty upon the plaintiffs. The standards of justiciability are not limited to those situations in which the plaintiffs are directly regulated by the defendant government official. Indeed, in none of the branch bank cases in which the plaintiff was a state bank did the challenged regulations impose a duty upon or regulate the plaintiffs in any manner. E.g. First Hardin National Bank v. Fort Knox National Bank, 361 F.2d 276 (6th Cir. 1966); First National Bank of Smithfield, N. C. v. Saxon, 352 F.2d 267 (4th Cir. 1965); Union Savings Bank of Patchogue v. Saxon, 118 U.S.App.D.C. 296, 335 F.2d 718 (1964); Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 285, 323 F.2d 290 (1963), rev'd on other grounds 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386 (1965), Commercial Security Bank v. Saxon, 236 F. Supp. 457 (D.C.D.C. 1964), affirmed First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343, (1966) rehearing denied 385 U.S. 1032, 87 S.Ct. 738, 17 L.Ed.2d 680 (1967). However, the justiciability assertion made by the Comptroller in each of these cases was decided adversely to the Comptroller.

The district court in Baker, Watts & Co. v. Saxon, supra, summarily rejected the Comptroller's contention, stating that:

> "* * * a justiciable controversy obviously exists justifying the Court in entertaining an action for a declaratory judgment. The plaintiffs claim that the defendant is authorizing national banks to conduct certain activities in violation of the law and that these activities transgress the powers of the banks and that they are injurious to the plaintiffs." 261 F.Supp. at 249.

The second ground for the lack of justiciability is premised on the theory that only the Comptroller can challenge the acts of a national commercial bank when it acts in excess of its powers. However, the primary thrust of

the plaintiffs' allegation is directed not at the national bank which is acting under authority granted by the Comptroller, but rather at the scope of the authority under which the Comptroller promulgated the regulation in issue. The district court in Georgia Association of Independent Insurance Agents, Inc. v. Saxon, supra, simultaneous with its denial of the motion to dismiss for lack of standing, rejected the Comptroller's assertions on the issue of justiciability. It unequivocally stated that:

> "The defendant further contends that * * * the Comptroller is sole enforcer of the National Banking Act. This contention is impliedly repudiated by the repeated decisions that banks have standing to challenge an allegedly illegal order * * * and was explicitly repudiated in an opinion by the Fifth Circuit Court of Appeals which stated. 'The fact that the Comptroller is charged under 12 U.S.C. § 93 with the duty of enforcing the National Banking Act certainly does not have the effect of prohibiting actions to enforce that law by any other party who might have a legitimate interest. Jackson v. First National Bank of Valdosta, 349 F.2d 71, at p. 75 (1965).'" 260 F. Supp. at 804.

A recent Supreme Court decision inferentially rejects the Comptroller's arguments on the lack of justiciability, Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The Supreme Court reversed and remanded to the Court of Appeals for the Third Circuit so that the Court of Appeals could consider the issues on the merits. The Court of Appeals had reversed the district court's decision without reaching the merits of the case, Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3rd Cir. 1965). The district court had found that "a justiciable controversy arises where plaintiff is confronted with substantial present or imminent harm. * * * the very presence of a threat of harm makes the regulations ready

for review." 228 F.Supp. 855, 861 (D.C.Del. 1964). The Court of Appeals reversed on the basis that no "actual case or controversy" existed as required for justiciability under the Declaratory Judgments Act. However, the Supreme Court decreed that "the impact of the regulations upon the plaintiffs is sufficiently direct and immediate so as to render the issue appropriate for judicial review at this stage." 387 U.S. at 152, 87 S.Ct. at 1517.

Having found that the plaintiffs have standing to seek redress and that they have presented a justiciable issue, we are now ready to seek a resolution of the subject matter involved in this litigation.

The principal issue involved in this controversy is whether or not the Comptroller has the statutory authority to empower national commercial banks to create, organize and manage the commingled Account. The gist of the activity of managing the Account consists of the purchase and sale of equity securities, nominally for long-term growth of capital and income, for the participating members. National banks have only such powers as are expressly given by federal statute or by necessary implication therefrom, 12 U.S.C. § 24. Houston v. Drake, 97 F.2d 863 (9th Cir. 1938), Baltimore & O. R. Co., et al. v. Smith, 56 F.2d 799 (3rd Cir. 1932), and in some trust activities they may be authorized to act by the Comptroller in any capacity in which competing state banks are permitted to act. 12 U.S.C. § 92a(a). See First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1923), and Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 55, 83 S.Ct. 520, 9 L.Ed2d 523 (1962), City of Yonkers v. Downey, 309 U.S. 590, 60 S.Ct. 796, 84 L.Ed. 964 (1940), rehearing denied 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, and Condon v. Downey, 310 U.S. 656, 60 S.Ct. 1071, 84 L.Ed. 1420, United States v. Palmer, 28 F.Supp. 936 (D.C.N.Y. 1939).

Authority to oversee trust activities of national banks which was vested in the Federal Reserve Board of Gov-

ernors, 12 U.S.C. § 248(k) was repealed in 1962 when authority to regulate the fiduciary activities of national banks was transferred to the Comptroller. 12 U.S.C. § 92a, 76 Stat. 668, Pub.L. 87-722. Upon transfer of this authority the Comptroller issued Regulation 9 pursuant to which the First National City Bank established the commingled Account. In order to determine the validity of Regulation 9, it will be necessary to investigate each section of the relevant statutes and also to determine the intent of Congress when it enacted the relevant statutes. In order to complete the determination of the issues involved, it will also be necessary to determine whether or not the relevant state statute, here the N. Y. Banking Law, McKinney's Consol. Laws, c. 2, Section 100, allows local state banks to act in a similar fashion as is presently being allowed by Regulation 9.

This Regulation authorizes national banks to commingle managing agent accounts, allowing, therefore, the bank to purchase equity securities for the Account in general and not for any specific participating member. The essence of this activity is the purchase and sale of securities deriving thereby a benefit for the participating members, and fulfilling the stated purpose of the Account.

The first statutory provision which is encountered along the logical progression to our conclusion is 12 U.S.C. § 92a which delineates the trust powers which the Comptroller is authorized to grant to the national banks. Section 92a (a) provides:

> "The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other cor-

> porations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located."

and under 12 U.S.C. § 92a(j) the Comptroller:[7]

> "* * * is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 76 Stat. 668, Pub.L. 87-722 § 1.

Pursuant to this statutory authority the Comptroller can empower national banks the right to act in a fiduciary capacity and to issue regulations controlling this activity. From the statutory language it can be concluded that the Comptroller can grant trust powers to the national banks; but the real crux of this issue is whether or not the commingled Account can be considered a fiduciary activity as provided by the statute.

The Comptroller cotends that there can be no doubt that the Bank's relationship to the participants in the commingled Account is a fiduciary relationship; however, this general statement, upon close analysis, is untenable. The principal-agent relationship arises from a contractual agreement between the parties. The nature of this relationship gives rise to certain duties which are implied by the law, namely, a fiduciary duty and a duty of loyalty. The trustee and the agent have an equivalent duty of loyalty. The fiduciary duty of the agent is similar to but not the equivalent of the fiduciary duty of a trustee.

The many differences as to the characteristics of a principal-agent relationship and a trustee relationship are notable especially as they relate to the issue in this case.

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[7] Section 11(k) of the Federal Reserve Act, as amended, 12 U.S.C. § 248(k) (repealed), empowered, in identical terms the Federal Reserve Board to issue regulations.

Consent of both principal and agent is a necessary requirement for the creation of the relation whereas the beneficiary of a trust need not consent. An agent is subject to the control of his principal, but a trustee is not subject to the control of the beneficiary. An agent can bind his principal by contract or otherwise, but a trustee has no such power with regard to his beneficiary. The agency relationship is terminable by the direction of the principal or by his death without any express provision to that effect, but this is untrue with respect to a trust unless the instrument so provides. See Restatement (Second) of Agency, Section 13, comment a, Section 14B, comments e to h, and Section 425, comment a. Note also Bogert, Trusts and Trustees, § 15 (2d. ed. 1965) p. 70 and Restatement of Trusts, 2d § 8, comment i.

The Bank and the individual participant of the Account enter into an agency relationship prior to or simultaneous with the participant's engagement with the Account. The Bank's role in this relationship is one of managing agent, not as trustee for the participant. A leading authority on the law of trusts has stated:

> "The duties and powers of the institution [e.g. a bank] as agent are determined by the terms of the contract made with the customer; the duties and powers of the institution as trustee depend not only upon the terms of the trust but also upon the principles and rules of the common law and of statutes which are applicable to the trust relation. The liabilities of the institution as agent depend upon whether it has failed to use due care in the performance of the duties which it undertakes; its liabilities as a trustee depend upon whether it has committed a breach of trust. Ordinarily the responsibilities of the institution are more extensive where it acts as trustee than where it acts as agent, and it may incur no liabilities as agent for conduct which would render it liable if it were trustee." 1 Scott on Trusts, Section 8.1 Bank as Trustee or Agent (2d. ed. 1956).

The courts, as well as the recognized authorities in trust law, have distinguished sharply between the responsibilities of a true trustee and those of a managing agent, even where the latter is granted complete discretion in acting for his principal. It is, of course, established that the managing agent occupies a position of confidence, in which he must act with reasonable care and is held to a standard of conduct higher than that which prevails in the ordinary course of business in the marketplace. But the courts have stated plainly that this is not the high standard of care and strict accounting imposed upon a trustee, Stephens v. Detroit Trust Co., 284 Mich. 149, 278 N.W. 799 (1933); Anderson v. Abbott, 61 F. Supp. 888 (W.D.Ky. 1945); O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N.W. 2d 507 (1949). In both the *Stephens* and *O'Connor* cases the principal brought suit for accounting against the defendant managing agent on the basis that they had breached the high duty of care imposed upon a trustee. The decisive factor in both cases was that the relationship which existed between the parties had been freely chosen and established and, having entered into an agency contract, the investor could not assert that the relationship was in fact a trust.[8]

Contrary to the contentions made by the Comptroller, the managing agent relationship is not a true fiduciary relationship as it has been defined by the courts and by the recognized authorities in this field. Therefore, it is concluded that the managing agency relationship does not fall within the traditional fiduciary powers as delineated in 12 U.S.C. § 92a(a).

Section 12 U.S.C. 92a(a), however, permits a national bank to act "in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national

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[8] But see, Saxon and Miller, Common Trust Funds, 53 Geo.L.J. 994, 1015, and Main, Common Trust Funds, 83 Banking L.J. 565.

bank is located." This saving provision allows national banks to offer the equivalent fiduciary services to their customers that a local state bank might offer.

The Comptroller has authorized the First National City Bank, located in New York state, to establish a commingled Account pursuant to Regulation 9, and under the competitive provision of 12 U.S.C. § 92a(a) the authorization granted to First National City Bank may be legally valid, if the banking laws of New York state allow competing institutions to establish a commingled Account.

The general powers of state banks in New York state are contained in McKinney's Consol.Laws, c. 2, N.Y. Banking Law § 96 as amended, L.1966, c. 324. These general powers have been supplemented by specific statutory provisions which grant state banks the power to act in a fiduciary capacity, N.Y. Banking Law, §§ 100, 100-a, 100-b, 100-c, as amended. Each of these statutory provisions delineate the authorization of state banks with a definite degree of specificity, and none of the sections noted above allow a commingling of managing agency accounts. The only section which could even be deemed to inferentially grant this authority is Section 100-c, which relates to the power of banks to commingle funds held in a fiduciary capacity, specifically requiring that common trust funds be limited to moneys received and held "as executor, administrator, guardian, personal or testamentary trustee, donee of a power during minority to manage property vested in an infant or committee * * *."

A search of the New York state case law has failed to reveal any relevant judicial interpretation of this statutory section. However, it has been held that state banks are prohibited to exercise any power which was not expressly granted, O'Connor v. Bankers Trust Co., 159 Misc. 920, 289 N.Y.S. 252 (Sup.Ct. 1936) affirmed 278 N.Y. 649, 16 N.E. 2d 302; see also Nassau Bank

v. Jones, 95 N.Y. 115, 47 Am.Rep. 14, (Ct. of App. 1884). These decisions indicate that New York state courts follow the federal rule, applicable to national banks, as expressed in Calif. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897), that the exercise of power not expressly granted to a national bank is prohibited. This restrictive interpretation of the powers granted under Section 100-c is further substantiated by noting that when the New York legislature has wanted to broaden the categories of accounts held and administered by banks which could be invested in a common trust fund, it has amended Section 100-c to do so.[9]

It is the conclusion of this court that the commingling of managing agency accounts is not authorized either under the federal statutes or the New York banking laws.

Even if the managing agency accounts could be considered bona fide fiduciary activities, and, therefore, authorized by the present statutes, the commingling of these accounts would still be illegal under the provisions of the Glass-Steagall Act. In order to arrive at this determination it is necessary to make an exact characterization of the Account which was established.

As noted in the early section of this decision, a mutual fund continuously issues its own securities as does the commingled Account. A mutual fund invests the proceeds from the sale of its securities in a diversified investment portfolio, in the same manner as the commingled Account.

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[9] For example, that section was amended to permit a state bank acting as the "donee of a power during minority to manage property vested in an infant" to place the property so managed in a common trust fund, L.1958, c. 496 § 1; L.1965, c. 824 § 5. Note also the specific accounting and notice provisions which are contained in Section 100-c as strictly construed by the courts in In re Lincoln Rochester Trust Co., 201 Misc. 1008, 111 N.Y.S.2d 45 (1952). See also New York Banking Board Regulation, 3 N.Y. C.R.R. 11.91 which states that a common trust fund "may be operated only for true fiduciary purposes."

The mutual fund shares obtains for the investor an undivided interest in the fund's portfolio, as does a unit of participation in the commingled Account. Within certain limitations, a participating member of the Account can redeem his units of participation in a similar manner as the holder of mutual fund shares. A majority of the participating members elect the members of the Committee, who oversee the affairs of the Account in much the same manner as mutual fund stockholders elect their board of directors or trustees. The SEC has required the Account to register as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. The SEC pursuant to its authority under 15 U.S.C. § 80-3(c), has granted certain exemptions to the requirements of the Investment Company Act as it relates to board membership;[10] nevertheless it has recognized the similarity between the Account and an investment company.[11] The Bank and the Committee have entered into a contractual agreement under which the Bank performs managing and advising functions for the Account. This contract is the equivalent of the contracts which are entered into by the mutual funds and their investment advisers. These contracts are subject to and must be submitted for review by the SEC under the provisions of the Investment Company Act.

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[10] The exemptions which were granted are being challenged in the Court of Appeals for the District of Columbia Circuit, National Association of Securities Dealers, Inc. v. Security Exchange Commission, Appeal No. 20,164, decided Nov. 21, 1967.

[11] The similarity between mutual funds and the Account have been noted by many authorities in the financial community, see Hearings on S. 2704 on Collective Investment Funds Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess. (1966); University of Pennsylvania Law School Conference on Mutual Funds, 115 U.Pa.L.Rev. 669; and Comment, Of Banks and Mutual Funds, 20 Sw.L.J.

There are some differences between a mutual fund and a commingled Account,[12] but these are not substantially sufficient to create a legal differentiation between the two investment vehicles. The similarities between these related activities are a sufficient basis to draw an analogy from which an equivalency can be premised.

The Comptroller attempts to differentiate between the mutual fund investment vehicle and the commingled Account by attempting to establish a major difference between a mutual fund share and a unit of participation. This differentiation is premised on the basis that the unit of participation is not a security as such. This is mere tautology and a matter of semantics.

The United States Supreme Court has noted that for the purposes of the Securities Act of 1933 the test for a security is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. SEC v. W. J. Howey, Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946). See also S.E.C. v. Variable Annuity Life Ins. Co., 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) and Prudential Insurance Co. of America v. S.E.C., 326 F.2d 383 (3rd Cir. 1964), cert. denied 377 U.S. 953, 84 S.Ct. 1629, 12 L.Ed.2d 497 (1964). Under this all encompassing definition, in its most comprehensive sense, whenever an investor relinquishes control over his funds and submits their control to another for the purpose and hopeful expectation of deriving profits therefrom he is in fact investing his funds in a security. The unit of participation in the commingled Account is in fact a security and has been so recognized by the SEC by its requirement that the Bank register the units of participation under the Securities Act of 1933.

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[12] See Hearings on S. 2704 (1966) supra, at pp. 55 and 56.

The Comptroller argues, however, that the definition of "securities" for the purpose of the Securities Act of 1933 is not applicable to define "securities" as the term is used in the Glass-Steagall Act. He asserts that this definition as judicially and administratively derived has no relevance to the meaning of the various provisions of the national banking laws. He bases this assertion on the allegedly different purposes which the laws have, namely that the securities laws were enacted to protect the interests of investors while the banking laws were enacted to protect the country's credit and currency and the solvency of the national banks. This differentiation fails to focus upon the primary essence of the complete regulatory scheme which the Congress enacted to mitigate the problems that the country faced in the 1930s. Congress, after extensive investigation, realized that the financial community needed stabilization in order to overcome the debacle which arose in 1929 and to prevent any further recurrences. It would be inconsistent to conclude that Congress did not intend to obtain the equivalent meaning for the term "securities" as used in the Securities Act of 1933 when it used the term in the Glass-Steagall Act which was enacted by the same Congress.[13]

By finding that the Account is an equivalent investment vehicle to a mutual fund and that the units of participation are in fact securities, it is, therefore, necessary to determine whether or not the Bank is barred from these activities by the provisions of the Glass-Steagall Act, Sections

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[13] The Federal Reserve Board has repeatedly ruled that participations or shares in mutual funds are securities for purposes of the Glass-Steagall Act, and it has similarly characterized the units of participation in the bank sponsored commingled managing agency account, Federal Reserve Board Legal Memorandum, "Legal Considerations Under Section 32 of the Banking Act of 1933 in Connection With the Proposed Commingled Investment Account of First National City Bank of New York" (Dec. 15, 1965) reprinted in Hearings on S. 2704 (1966) at 581-588.

16, 20, 21 and 32, codified in 12 U.S.C. §§ 24, 377, 378 and 78 respectively.

The first relevant section is 12 U.S.C. § 24 dealing with the explicit powers granted to the national banks by the Congress. For our analysis only paragraph Seventh is pertinent. It states:

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided,* That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. * * *"

The power of national banks to deal in securities has had a motley history, both legislatively and judicially. In 1823 the Supreme Court held that a prohibition against a national bank's trading and dealing in stocks was nothing more than a prohibition against engaging in the ordinary business of buying and selling stocks for a profit and it did not include purchases resulting from ordinary banking transactions. Fleckner v. Bank of the United States, 8 Wheat, 338, 351, 21 U.S. 338, 351, 5 L.Ed. 631 (1823). In First National Bank of Charlotte v. Nat. Exchange Bank,

92 U.S. 122, 23 L.Ed. 679 (1875), the Supreme Court stated that "Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power." 92 U.S. at 128. The Court in the First National Bank case was interpreting, Rev.Stat. § 5136, par. 7, 15; 15 Stat. 101 § 8, the forerunner of 12 U.S.C. § 24, par. 7 which delineated the powers of the national banks.

The limitation on the national bank's power in security dealings was reiterated in subsequent decisions of the Supreme Court. Concord First National Bank v. Hawkins, 174 U.S. 364, 371, 19 S.Ct. 739, 43 L.Ed. 1007 (1898); California Nat. Bank v. Kennedy, 167 U.S. 362, 17 S.Ct. 831, 42 L.Ed. 198 (1897); McCormick v. Market National Bank, 165 U.S. 538, 17 S.Ct. 433, 41 L.Ed. 817 (1896); see also Birdsell Mfg. Co. v. Anderson, 20 F.Supp. 571 (W.D. Ky. 1937) affirmed 104 F.2d 340 (6th Cir. 1939), and Michelsen v. Penney, 135 F.2d 409, 424 (2nd Cir. 1943).

This implied limitation caused the national banks to establish security affiliates, organized under state law, to profit from underwriting and dealing in stocks and other securities. In 1927 Congress passed the McFadden Act which added to the list of banking powers in paragraph Seventh of Section 5136 of the Revised Statutes the following proviso:

> "Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities, under such further definition of the term 'investment securities' as may by regulation be prescribed by the Comptroller of the Currency * * *. [Act of February 25, 1927 (McFadden Act), Section 2(b), 44 Stat. 1226]"

This proviso was intended to be a confirmation and a regulation of the investment security business which was being conducted by the banks through their security affiliates. H.R.Rep.No. 83, 69th Cong. 1st Sess. (1926). By the provisions of this Act, the national banks were authorized by statute to engage in the business of underwriting and dealing in investment securities.

The storms looming on the horizon were not within the contemplation of very many people in 1927. It was not until 1931 when the Congress, graced with hindsight, sought the primary causes of the debacle which enveloped the country and had its repercussions throughout the world. The Congressional inquiry generated various statutes in an attempt to avoid a repetition of the debacle which had transpired. Among these statutes were the Glass-Steagall Act and the Securities Act of 1933.

The Glass-Steagall Act in particular redefined the powers of the national banks and imposed severe limitations on their activity in the investment security business by amending 12 U.S.C. § 24, par. 7, and adding 12 U.S.C. §§ 78, 377 and 378. Section 24, paragraph Seventh, has been noted above. The other relevant sections are noted below. Section 32 of the Glass-Steagall Act, now 12 U.S.C. § 78, provides:

> "No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly

influence the investment policies of such member bank or the advice it gives its customers regarding investments."

Section 20 of the Glass-Steagall Act, now 12 U.S.C. § 377, provides:

"After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities: *Provided,* That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs.

"For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for each day during which such violation continues. Such penalty may be assessed by the Board of Governors of the Federal Reserve System, in its discretion, and, when so assessed, may be collected by the Federal reserve bank by suit or otherwise.

"If any such violation shall continue for six calendar months after the member bank shall have been warned by the Board of Governors of the Federal Reserve System to discontinue the same, (a) in the case of a national bank, all the rights, privileges, and franchises granted to it under chapter 2 of this title may be forfeited in the manner prescribed in sections 141, 222-225, 281-286 and 502 of this title, or, (b) in the case of a State member bank, all of its rights

and privileges of membership in the Federal Reserve System may be forfeited in the manner prescribed in sections 321-332 of this title."

Section 21 of the Glass-Steagall Act, now 12 U.S.C. § 378, provides:

"(a) After the expiration of one year after June 16, 1933, it shall be unlawful—

"(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further,* That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate;

* * * * * * * * *

"(b) Whoever shall willfully violate any of the provisions of this section shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director,

employee, or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both."

The obvious purpose of these legislative enactments was to divorce the banking business from the security investing business. Congress was so emphatic in promulgating this divorce, that it included a criminal provision to assure the efficacy and continuity of the separation; see 12 U.S.C. § 378(b), supra, and in some instances it imposed money penalties and forfeitures; see 12 U.S.C. § 377, supra. The many pages of legislative hearings reports which preceded the final enactment of the Glass-Steagall Act contain and outline the potential dangers which the involvement of commercial banking in the investment security business created.

These potential dangers were noted by the Comptroller of the Currency in his report of 1920, excerpts of which were cited by the Subcommittee of the Senate conducting the investigation:

"Some 'securities companies' operating in close connection with, and often officered by, the same men who manage the national banks with which they are allied, have become instruments of speculation and headquarters for promotions of all kinds of financial schemes. Many of the flotations promoted by the 'securities corporations' which are operated as adjuncts to national banks have proven disastrous to their subscribers, and have in some instances reflected seriously not only upon the credit and the standing of the 'securities companies' by which they are sponsored, but also in some cases have damaged the credit and reputation of national banks with which the 'securities companies' are allied.

"It has been established clearly by decisions of the United States Supreme Court that a national bank can not, except as authorized by the Federal reserve act, hold the stock of other national banks or the stock of other corporations; but these adjunct or auxiliary companies whose stockholders are identical with the stockholders of the national banks with which they are connected by various ties and devices frequently deal actively in stocks, and they also sometimes acquire the ownership or control of other banks, National and State, through their stock purchases.

"In times of rising prices and active speculation some of these auxiliary corporations have made large profits through their ventures and syndicate operations, but their losses in other periods have been heavy, and they have become an element of increasing peril to the banks with which they are associated. The business of legitimate banking is entirely separate and distinct from the kind of business conducted by many of the 'securities corporations', and it would be difficult, if not impossible, for the same set of officers to conduct safely, soundly, and successfully the conservative business of the national bank and at the same time direct and manage the speculative ventures and promotions of the ancillary institutions. These varying institutions demand a different kind of ability and experience on the part of those who manage them, and the two types of business when combined with one management are likely to be operated to the advantage of neither.

* * * * * * * * *

"These ancillary companies are being used with increasing frequency for promotion of speculation and for dealing in bonds and stocks, often those of new and unseasoned issues, and which are attended with improper hazard risk, and as a means of enabling

banks to do, indirectly through their instrumentality, things which they can neither safely nor lawfully do directly." [See Hearings Pursuant to S. Res. 71 Before a Subcommittee of the Senate Committee on Banking and Currency, 71st Cong. 3d Sess. pp. 1067-1068 (1931)]

The Senate Subcommittee Report also outlined the organization and functions of the security affiliates. Among one of these functions was the operation of investment trusts which bought and sold securities purely for investment or speculative purposes, Hearings, S.Res. 71, p. 1057. These investment trusts were the equivalent of our present day investment companies.[14]

Another drawback which the Subcommittee Report recognized was that "in the case of a trust company or a bank with a trust department, the possession of a security affiliate may adversely affect the independence with which fiduciary activities are exercised." Hearings, S.Res. 71, p. 1064.

There can be little doubt as to what Congress intended to do by the enactment of the Glass-Steagall provisions outlined above. Section 16, 12 U.S.C. § 24, par. 7 prohibits national banks from not only underwriting securities directly but also limits the capacity of the national banks in the purchase and sale of securities. Awotin v. Atlas Exchange Bank, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935); cf. United States v. Philadelphia National Bank, 374 U.S. 321, 329, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), First Natl. Bank in St. Louis v. State of Missouri, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1923), Genessee Trustee Corp. v. Smith, 102 F.2d 125, 127 (6th Cir. 1939), Guaranty Trust Co. v. United States, 44 F.

[14] S.E.C. Report on the Public Policy Implications of Investment Company Growth, H.R.Rep.No. 2337, 89th Cong. 2nd Sess. p. 33, Fn. 3 (1966).

Supp. 417, (E.D.Wash. 1942), affirmed 139 F.2d 69 (9th Cir. 1943), United States v. Palmer, 28 F.Supp. 936 (S.D.N.Y. 1939). Section 20, 12 U.S.C. § 377 effectively provides that national banks may not be affiliated with an entity which is engaged principally in the business of purchasing, selling, or underwriting securities. Section 21, 12 U.S.C. § 378 specifically provides that it is unlawful for any entity which is engaged in the business of purchasing, selling, or underwriting to also be engaged in the banking business. Section 32, 12 U.S.C. § 78 prohibits banks and investment organizations from having interlocking directorates, and common officials and employees. Through this legislative scheme Congress intended to separate these previously integrated activities, and it made its intent explicitly clear. Merchants National Bank of Mobile v. Commissioner of Internal Revenue, 199 F.2d 657 (5th Cir. 1952); Commissioner of Internal Revenue v. Merchants Nat. Bldg. Co., 131 F.2d 740, 741 (5th Cir. 1942); cf. Paramount Pictures v. Langer, 23 F.Supp. 890, 902 (D.N.D. 1938), reversed as moot 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025 (1938), Morgan Stanley & Co. v. S.E.C., 126 F.2d 325, 329 (2nd Cir. 1942).

The Supreme Court has stated with specific relation to Section 32, 12 U.S.C. § 78, that "It [Section 32] is a preventive or prophylactic measure. The fact that respondents have been scrupulous in their relationship to the bank is therefore immaterial," Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441, 449, 67 S.Ct. 311, 415, 91 L.Ed. 408 (1946), see also United States v. Brown, 381 U.S. 437, 454, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). This "prophylactic" aspect of Section 32 is also inherent in Sections 20 and 21. This is effective legislation against temptation, National Maritime Union of America v. Herzog, 78 F.Supp. 146, 171 (D.C.D.C. 1948) affirmed 334 U.S. 354 (1948), and it should not be derogated except by the Congress.

The Comptroller contends that the Account has been passed upon and approved by the Federal Reserve Board of Governors as far as its establishment would be contrary to the provisions of Section 32, 12 U.S.C. § 78.[15] In order to support its conclusion the Board promulgated a "single entity" theory, that is, that the Bank and the Account would constitute a single entity for the purposes of Section 32, since the Account would be regarded as nothing more than an arm or department of the Bank. This proposition seems to be based more on nuances of language than on the factual ascertainment of the relationship of the Account with the Bank. The Account is to be governed by an independent board of directors, the Committee, with full policy making authority. The Committee is elected by a majority of the units of participation in the Account and is responsible only to the investor-participants in the Account and not to the Bank. The Bank serves as investment adviser to the Account and also provides administrative services. It performs these services pursuant to a contract which conforms to the requirements of Section 15 of the Investment Company Act, 15 U.S.C. § 80a-15. The contract is terminable at any time, by either party, with sixty days notice and may be continued only upon annual approval of the invest or-participants or of a majority of the Committee, including a majority of the members of the Committee not affiliated with the Bank. The contract will also terminate automatically if assigned by the Bank. When all these factors are taken into consideration, it is obvious that the Bank is contractually affiliated with the Account and cannot, therefore, be considered a department of the bank.[16] The

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[15] Hearings, S. 2704 (1966) p. 580-588, supra.

[16] Under the provisions of the Account, the participants or a majority of the independent members of the Committee could sever relations with the Bank by electing not to renew the contractual management agreement; practically this may never occur; however, it is possible under the present structure of the Account.

prophylactic provision of Section 32 prevents the Bank from being affiliated with the Account.

Furthermore, since it is the conclusion of this court that the Account is in fact an investment fund, the complementary provisions of Sections 20 and 21, 12 U.S.C. §§ 377 and 378, prohibit the Account from being affiliated with the Bank and the Bank from being affiliated with the Account.

The Comptroller further contends that the inherent dangers with which the integration of these financial activities was previously fraught are not present in the instant relationship, since the Bank only receives a set fee for managing the Account and does not obtain any remuneration from issuing or underwriting the units of participation. This limitation in probable expected remuneration to the Bank may mitigate the possible aggressive use of the Account by the Bank, but this does not override the clear and unequivocal Congressional mandate that national banks be divorced from investment organizations.[17]

It is a legislative process which determines the newly evolving circumstances which require a change in the statutes. The courts can only enforce and interpret the legislative enactments. The statutes presently in force do not allow a national bank to establish, operate, or be affiliated with an investment fund.

In view of the statements and conclusions made above, this court holds that the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision of the Glass-Steagall Act and are, therefore, illegal. The promulgation of these

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[17] The possible conflicts of interests between the Account and other aspects of the bank's activities are still present, notwithstanding the precautions which were taken by the Comptroller in delineating the powers of the Account. See Banks and Mutual Funds, Comment, 20 Sw.L.J. 334, 341, 342.

specific provisions allowing a commingling of managing agency accounts is also beyond the power of the Comptroller under Section 92a(a) of Title 12, and it is ordered to be set aside.

The summary judgment motion of the defendant is denied and motion of plaintiffs is granted.

Counsel for plaintiffs will submit an Order in accordance with the foregoing.

Dated: September 27, 1967.

APPENDIX C

Judgment of the Court of Appeals

[Caption Omitted]

On Petition for Review of an order of the Securities and Exchange Commission and on appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge; and Burger, Circuit Judge.

JUDGMENT

These causes came on to be heard on petitioner's petition for review and on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

Upon consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order on review herein in case No. 20,164 is hereby affirmed and it is

FURTHER ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein in case Nos. 21,661 and 21,662 are hereby reversed.

Per Curiam.

Dated: June 21, 1969

Opinions will follow at a later date.

APPENDIX D

Order of the Court of Appeals Denying Rehearing

[Caption Omitted]

Before: Bazelon, Chief Judge; and Wilbur K. Miller, Senior Circuit Judge, in Chambers.

ORDER

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam.

[Dated: August 15, 1969]

APPENDIX E

Statutes and Regulations Involved

1. Sections 16, 20, 21 and 32 of the Glass-Steagall Banking Act of 1933, 48 Stat. 184-85, 188-89, 194 (1933), *as amended*, 49 Stat. 707, 709 (1935), 12 U.S.C. §§ 24, 377, 378, 78 (1964) provide in pertinent part:

> SEC. 16 Paragraph "Seventh" of section 5136 of the Revised Statutes, as amended (U.S.C. title 12, sec. 24; Supp. vi, title 12, sec. 24), is amended to read as follows:
>
> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discontinuing and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal

security; and by obtaining, issuing and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: Provided, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. * * * "

SEC. 20. (a) After one year from the date of the enactment of this Act, no member bank shall be affiliated in any manner described in section 2(b) hereof with

any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

* * *

SEC. 21. (a) after the expiration of one year after June 16, 1933, it shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided,* That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further,* * * *

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may al-

low such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

* * *

2. Public Law 87-722, 76 Stat. 668 (1962), U.S.C., Title 12, § 92a (1964) provides:

(a) The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

* * *

(j) . . . The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

3. Regulation 9 of the Comptroller of the Currency, 12 C.F.R. § 9 (1967), provides in pertinent part:

§ 9.18 Collective investment.

(a) Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively:

(1) In a common trust fund maintained by the bank exclusively for the collective investment and reinvestment

of monies contributed thereto by the bank in its capacity as executor, administrator, guardian or trustee under a will or deed;

(2) In a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other trusts which are exempt from Federal income taxation under the Internal Revenue Code;

(3) In a common trust fund, maintained by the bank exclusively for the collective investment and reinvestment of monies contributed thereto by the bank in its capacity as managing agent under a managing agency agreement expressly providing that such monies are received by the bank in trust;

(b) Collective investments of funds or other property by national banks under paragraph (a) of this section (referred to in this paragraph as "collective investment funds") shall be administered as follows:

(1) Each collective investment fund shall be established and maintained in accordance with a written plan (referred to herein as the Plan) which shall be approved by a resolution of the bank's board of directors and filed with the Comptroller of the Currency. The Plan shall contain appropriate provisions not inconsistent with the rules and regulations of the Comptroller of the Currency as to the manner in which the fund is to be operated, including provisions relating to the investment powers of the bank with respect to the fund, the allocation of income, profits and losses, the terms and conditions governing the admission or withdrawal of participations in the fund, the auditing of accounts of the bank with respect to the fund, the basis and method of valuing assets in the fund, the minimum frequency for valuation of assets of the fund, the period following each such valuation date during which the valuation may be made, the basis upon which the fund may be terminated, and such other matters as may be necessary to define clearly the rights of participants in the fund: *Pro-*

vided, That Plans which have been established in conformance with prior regulations of the Board of Governors of the Federal Reserve System or the Comptroller of the Currency may continue to conform to such regulations rather than the requirements of this paragraph, for a reasonable period. A copy of the Plan shall be available at the principal office of the bank for inspection during all banking hours, and upon request a copy of the Plan shall be furnished, to any person.

(2) Monies held by the bank in its capacity as managing agent shall not be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section. Property held by the bank in its capacity as trustee of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code may be invested in collective investment funds established under the provisions of paragraph (a) (1) or (2) of this section, subject to the provisions herein contained pertaining to such funds. Assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code and held by the bank, in whatever capacity, may be invested in collective investment funds established under the provisions of paragraph (a) (2) of this section.

(3) All participations in the collective investment fund shall be on the basis of a proportionate interest in all of the assets. In order to determine whether the investment of funds received or held by the bank as fiduciary in a participation in a collective investment fund is proper, the bank may consider the collective investment fund as a whole and shall not, for example, be prohibited from making such investment because any particular asset is non-income producing.

(4) Not less frequently than once during each period of three months a bank administering a collective invest-

ment fund shall determine the value of the assets in the fund as of the dates set for the valuation of assets. No participation shall be admitted to or withdrawn from the fund except (i) on the basis of such valuation and (ii) as of such valuation date. No participation shall be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action shall have been entered on or before the valuation date in the fiduciary records of the bank and approved in such manner as the board of directors shall prescribe. No such request or notice may be cancelled or countermanded after the valuation date.

(5) (i) A bank administering a collective investment fund shall at least once during each period of 12 months cause an adequate audit to be made of the collective investment fund by auditors responsible only to the board of directors of the bank. In the event such audit is performed by independent public accountants, the reasonable expenses of such audit may be charged to the collective investment fund.

(ii) A bank administering a collective investment fund shall at least once during each period of 12 months prepare a financial report of the fund which shall be filed with the Comptroller of the Currency. This report, based upon the above audit, shall contain a list of the investments in the fund showing the current market value of each investment, a statement for the period since the last report showing purchases, sales and any other investment changes, income and disbursements, and an appropriate notation as to any investment in default.

(iii) The financial report may include a description of the fund's value on previous dates as well as its income and disbursements during previous accounting periods. The report shall make no reference to the performance of funds other than those administered by the bank, and no predictions or representations as to future results.

(iv) A copy of the financial report shall be furnished, or notice shall be given that a copy of such report is available and will be furnished without charge upon request, to each person to whom a regular periodic accounting would ordinarily be rendered with respect to each participating account. The report, in such summarized form as prescribed by the Comptroller of the Currency, shall be published in a newspaper of general circulation in the place where the principal office of the bank is located. In addition, a full report shall be furnished upon request to any person, and the fact of the availability of such material may be given publicity solely in connection with the promotion of the fiduciary services of the bank. Except as herein provided, the bank shall not advertise or publicize its collective investment fund(s). The cost of printing, publication and distribution of the report shall be borne by the bank.

(6) When participations are withdrawn from a collective investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind, provided that all distributions as of any one valuation date shall be made on the same basis.

(7) If for any reason an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it shall be segregated and administered or realized upon for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(8) (i) A bank administering a collective investment fund shall not *(a)* have any interest in such fund other than in its fiduciary capacity (funds held by a bank as fiduciary as described under paragraph (a) (1) or (2) of this section for its own employees may be invested in such a fund) or *(b)* make any loans on the security of a participation in such fund. If because of a creditor relationship or other-

wise the bank acquires an interest in a participation in such fund, the participation shall be withdrawn on the first date on which such withdrawal can be effected. However, in no case shall an unsecured advance to an account holding a participation until the time of the next withdrawal be deemed to constitute the acquisition of an interest by the bank.

(ii) The bank may purchase for its own account from a collective investment fund any defaulted mortgage held by such fund, if in the judgment of the board of directors the cost of segregation of such mortgage would be greater than the difference between its market value and its principal amount plus interest and penalty charges due. If the bank elects to so purchase the mortgage it must do so at its market value or at the sum of principal, interest and penalty charges, whichever is greater.

(9) Except in the case of collective investment funds described in paragraph (a) (2) of this section:

(i) No funds or other property shall be invested in a participation in a collective investment fund if as a result of such investment the participant would have an interest aggregating in excess of ten per cent of the then market value of the fund: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such accounts shall be considered as one;

(ii) No investment for a collective investment fund shall be made in stocks, bonds or other obligations of any one person, firm or corporation if as a result of such investment the total amount invested in stocks, bonds or other obligations issued or guaranteed by such person, firm or corporation would aggregate in excess of ten percent of the then market value of the fund: *Provided*, That this limitation shall not apply to investments in direct obligations of the

United States or other obligations fully guaranteed by the United States as to principal and interest;

(iii) Any bank administering a collective investment fund shall have the responsibility of maintaining in cash and readily marketable investments such part of the assets of the fund as shall be deemed to be necessary to provide adequately for the needs of participants and to prevent inequities between such participants, and if prior to any admissions to or withdrawals from a fund the bank shall determine that after effecting the admissions and withdrawals which are to be made less than 40 percent of the value of the remaining assets of the collective investment fund would be composed of cash and readily marketable investments, no admissions to or withdrawals from the fund shall be permitted as of the valuation date upon which such determination is made: *Provided,* That ratable distribution upon all participations shall not be so prohibited in any case.

(10) The reasonable expenses incurred in servicing mortgages held by a collective investment fund may be charged against the income account of the fund and paid to servicing agents, including the bank administering the fund.

(11) (i) A bank may (but shall not be required to) transfer up to five percent of the net income derived by a collective investment fund from mortgages held by such fund during any regular accounting period to a reserve account: *Provided,* That no such transfers shall be made which would cause the amount in such account to exceed one percent of the outstanding principal amount of all mortgages held in the fund. The amount of such reserve account, if established, shall be deducted from the assets of the fund in determining the fair market value of the fund for the purposes of admissions and withdrawals.

(ii) At the end of each accounting period, all interest payments which are due but unpaid with respect to mortgages in the fund shall be charged against such reserve

account to the extent available and credited to income distributed to participants. In the event of subsequent recovery of such interest payments by the fund, the reserve account shall be credited with that amount so recovered.

(iii) Notwithstanding anything herein contained to the contrary, Mortgage Investment Funds presently being operated pursuant to the provisions of section 17(d) of prior regulations of the Comptroller of the Currency or the Board of Governors of the Federal Reserve System may continue to be operated in accordance with such prior regulations for a reasonable time. However, after April 5, 1963, no such funds shall be established.

(12) A national bank administering a collective investment fund shall have the exclusive management thereof. The bank may charge a fee for the management of the collective investment fund provided that the fractional part of such fee proportionate to the interest of each participant shall not, when added to any other compensations charged by the bank to the participant, exceed the total amount of compensations which would have been charged to said participant if no assets of said participant had been invested in participations in the fund. The bank shall absorb the costs of establishing or reorganizing a collective investment fund.

(13) No bank administering a collective investment fund shall issue any certificate or other document evidencing a direct or indirect interest in such fund in any form.

(14) No mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund shall be deemed to be a violation of this part if promptly after the discovery of the mistake the bank takes whatever action may be practicable in the circumstances to remedy the mistake.

(c) In addition to the investments permitted under paragraph (a) of this section, funds or other property received

or held by a national bank as fiduciary may be invested collectively, to the extent not prohibited by local law, as follows:

(1) In shares of a mutual trust investment company, organized and operated pursuant to a statute that specifically authorizes the organization of such companies exclusively for the investment of funds held by corporate fiduciaries, commonly referred to as a "bank fiduciary fund".

(2) In a single real estate loan or a direct obligation of the United States, or an obligation fully guaranteed by the United States, if the bank owns no participation in the loan or obligation and has no interest therein except in its capacity as fiduciary.

(3) In a common trust fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator or guardian, which the bank considers to be individually too small to be invested separately to advantage, and the total investment in which on the part of any one account does not exceed $10,000: *Provided*, That in applying this limitation if two or more accounts are created by the same person or persons and as much as one-half of the income or principal of each account is payable or applicable to the use of the same person or persons, such account shall be considered as one: *And provided*, That no fund shall be established or operated under this subparagraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(4) In any investment specifically authorized by court order or authorized by the instrument creating the fiduciary relationship: *Provided*, That such investment is not made under this paragraph for the purpose of avoiding the provisions of paragraph (b) of this section.

(5) In such other manner as shall be approved in writing by the Comptroller of the Currency.